

THE DOCTRINE OF ABSOLUTE LIABILITY AND THE RIGHT TO A SAFE ENVIRONMENT: ISSUES AND CHALLENGES IN THE LIABILITY OF ENVIRONMENTAL POLLUTERS IN NIGERIA

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ABSTRACT

Oil and gas exploitation and production in Nigeria, particularly in the Niger Delta region, is awash with pollution incidents with its attendant impact on the health of locals as well as foreseeable damage on the biodiversity of the region. Owing to this development, victims of environmental pollution have repeatedly instituted legal actions against transnational corporations (TNCs) and the Federal Government with a view to recovering damages and enforcing rights via statutory claims (which basically reflects traditional English common law rules on liability). Notwithstanding, it is observed that such claims have not availed victims of pollution with the basic reliefs sought, and this is seemingly traceable to the ‘economic interest’ which government retains in oil and gas activities, the technicalities in proving negligence on the part of TNCs; as a vast majority of oil pollution incidents are caused by ‘acts of third parties’, and under such scenarios, TNCs will only be liable where they neglect to protect oil facilities, and the lack of direct legal provisions to provide for fundamental rights to a clean environment, although even before Nigeria attained her independence in 1960 the Oil Pipelines Act of 1955 addressed some oil-related environmental problems. These challenges, amongst others have prompted victims of environmental pollution in Nigeria, in recent years, to seek for legal redress in foreign jurisdictions.

The current research opted for turnaround in the environmental justice system by considering whether there is any legal nexus between environmental pollution and breach of fundamental rights (‘rights to a healthy environment’) of the people, and whether such right will generate an absolute liability against TNCs? It is recognised that ‘fundamental rights’ which are found in the Nigerian Constitution have higher status over other rights as contained in statutes, and where these rights are violated, liability will be either strict or absolute as the case may be; this is pursuant to findings in the current research that the defence of ‘act of third parties’ and others may not be sustained in fundamental rights enforcement proceedings, and owing to this, victims of environmental pollution incidents in Nigeria will be able to get adequate redress and secure higher standards of environmental quality. This conclusion is reached through a close examination of legal instruments, case-law and opinions of experts in Nigeria and a limited number of other jurisdictions.

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ABBREVIATIONS

African Human Rights Law Reports.....	AHRLR
African Journal of International and Comparative Law.....	AJICL
All India Reporter.....	AIR
Economic Community of West African States.....	ECOWAS
Buffalo Law Review.....	BLR
Environmental Law and Management.....	ELM
European Journal of International Law.....	EJIL
European Human Rights Reports.....	EHRR
Environmental Law Review.....	ELR
Federal High Court.....	FHC
Fundamental Rights Enforcement Procedure.....	FREP
Harvard International Law Journal.....	HILJ
Journal of African Law.....	JAL
Journal of Energy and Natural Resources Law.....	JENRL
Journal of Environmental Law.....	JEL
Journal of Planning & Environment Law.....	JPEL
Justice of the Supreme Court.....	JSC
Laws of the Federation of Nigeria.....	LFN
International Energy Law & Taxation Review.....	IELTR
International Energy Law Review.....	IELR
International Company and Commercial Law Review.....	ICCLR
Natural Resources Journal.....	NRL
Nigerian Institute of Advanced Legal Studies.....	NIALS

Nigerian Weekly Law Reports.....	NWLR
Nigerian National Petroleum Corporation.....	NNPC
Scottish Planning and Environmental Law.....	SPEL
Shell Petroleum Development Company.....	SPDC
Sri Lanka Journal of International Law.....	SLJIL
Stellenbosch Law Review.....	SLR
Statute Law Review.....	SLR
The Journal of Legal Studies.....	JLS
Trinity College Law Review.....	TCLR
Technology and Construction Court.....	TCC
Transnational Environmental Law.....	TEL

INTRODUCTION

Environmental Justice in Nigeria: What are the Challenges?

The current research is anchored on the growing reports of environmental pollution incidents in Nigeria, the attendant negative impact on the environment (particularly in the Niger Delta Region)¹ and the commitment of victims of oil and gas pollution incidents to seek legal redress both in municipal and foreign courts. It is observed that obtaining environmental justice in Nigeria is enmeshed with difficulties ranging from inadequate compensation complaints, judicial favouritism towards government and oil transnational corporations (hereinafter ‘TNCs’) as against victims of oil pollution, issues of judicial technicalities, the lack of public awareness on environmental matters; particularly the lack of access to environmental justice. In view of this, significant environmental pollution cases are pursued abroad in recent years. Recently, a Nigerian farmer and fisherman instituted legal claims for damages occasioned by oil spills from SPDC’s (Shell Petroleum Development Company) facilities between 2006 and 2007 against Royal Dutch Shell (SPDC’s parent company headquartered in Netherlands) in a Hague District Court.² Commenting on a more recent oil spill amounting to around 3,800 barrels and the rationale for foreign legal redress, a Bonny Island Community leader in Rivers State of Nigeria, Amasenibo, remarked that:

Normal life has stopped here because of the spill. This was just the last of multiple spills we have experienced. Shell has still not done the clean-up here. They are a big company and if we go to the Nigerian courts, they will win.³

1

Ibibia L Worika, ‘Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria’s Niger Delta? (2001-2002) 8 (1) JICL 5-6.

2

FA Akpan & Anor v Royal Dutch Shell & Anor (District Court of The Hague) Case No. C/09/337050/HA ZA 09-1580, 30 January 2013 <<https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-shell-oil-spill-ikot-ada-udo>> accessed 12 January 2016.

3

John Vidal, ‘Niger delta communities to sue shell in London for oil spill compensation’ *The guardian* (London, 7 January 2015) <<https://www.theguardian.com/environment/2015/jan/07/niger-delta-communities-to-sue-shell-in-london-for-oil-spill-compensation>> accessed 15 October 2015.

Lately, in *The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd*,⁴ more than 15,000 claimants sought damages at common law and statutory compensation under Nigerian law in a London High Court in relation to oil spills alleged to have been caused by Shell Petroleum Development Company of Nigeria (SPDC). It is observed that the aforesaid case and other related cases bordering on claims for oil spill damages are anchored on common law principles of liability (such as nuisance, negligence and the strict liability rule), which have been transplanted into municipal laws in Nigeria. The Nigerian legal system is closely based on the English law.⁵ The Bodo community is in the Gokana Local Government Area in Rivers State, one of the major oil producing states in the Niger Delta Region. Over the years, there have been a series of court proceedings against Shell by individuals, communities and other representative bodies within domestic courts in Nigeria. In the *Bodo Community case*, both the claimants and the defendant, by agreement, but subject to some jurisdictional reservations,⁶ opted for an English court (Technology and Construction Court) to determine, primarily: whether SPDC can be liable to pay compensation for damage caused by oil from its pipelines that has been released owing to illegal refining⁷ between 2008 and 2009, amongst others.

It is observed that the traditional principles of liability in environmental pollution cases, such as the strict liability rule, torts of nuisance and negligence are vague, or overtly unsatisfactory and undermines the legal rights of the inhabitants of such pollution prone areas to enjoy a safe, or healthy environment. In view of these shortcomings, Kalu and Stewart reasoned that:

Litigation in regular courts has not helped the situation. This is primarily because the highly scientific, technical and sophisticated nature of the operations of oil companies makes it imperative for a plaintiff to be well

4

[2014] EWHC 1973 (TCC).

5

Lee J McConnell, 'Establishing Liability for Multinational Companies in Parent/Subsidiary Relationships' (2014) 16 ELR 50, 53.

6

See *Bodo Community case* (n 4) [9]. One of the preliminary issues (Issue 6), was whether the English Court lacks jurisdiction to try some or all of the claims raised by the Bodo community?

7

ibid [9].

versed in this area to be able to recover damages for his losses in suits for compensation or negligence.⁸

Kalu and Stewart's position above deserves support in view of the legal burden encountered in establishing torts of negligence and other related torts in environmental pollution cases, particularly where most victims do not fully understand the operational rules and activities of the oil operators. In addition, it is shown in a plethora of decided cases that TNCs mostly furnish the defence of 'malicious act of third parties' to escape liability, arguing that the cause of oil spills is an effect of illegal oil bunkering and/or intentional pipeline vandalism by saboteurs, and this defence is valid in both common law and extant statutory schemes on environmental liability in Nigeria,⁹ particularly the Oil Pipelines Act 2004.¹⁰

Owing to the technicalities involved in establishing liability based on the above mentioned traditional tortious rules, it becomes necessary in the current research to explore 'fundamental rights enforcement proceedings' as a tool for obtaining environmental justice and protection; and fundamental rights, being considered as 'absolute rights' may project a stricter or even an absolute liability on environmental polluters than the aforementioned common law principles which are evidently embodied in various environmental statutory schemes in Nigeria, particularly the Oil Pipelines Act 2004.¹¹

It is maintained that the oil and gas activities engaged by TNCs are profitable to the state, thereby promoting the economic well-being of the state, and applying strict principles of liability in incidents of environmental pollution would expose TNCs to a series of litigation and compensation claims which would adversely affect the profits accruing to the state. It is worth noting that the Nigerian economy is substantially dependent on crude oil, as the oil sector remains the core revenue earner of the Nigerian economy accounting for over 80

8

Victoria E Kalu and Ngozi F Stewart, 'Nigeria's Niger Delta Crises and Resolution of Oil and Gas Related Disputes: Need for a Paradigm Shift' (2007) 25 JENRL 244, 253.

9

See *Bodo Community* case (n 4) [93] (Mr Akenhead).

10

Cap O7 LFN 2004, s 11(5)(c).

11

McConnell (n 5) 53.

percent of the country's total export earnings and about 70 percent of government revenue.¹² The interest which the Nigerian state has in the oil sector is clearly reflected in section 44(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), vesting the ownership and control of mineral oils and natural gas in the Government of the Federation. In view of the foregoing, Atsegbua observed that if the fundamental right to a clean environment is directly inculcated in the 1999 Constitution of Nigeria, and becomes enforceable, the oil communities of the Niger Delta will begin to assert their constitutional rights, and that the government may feel that such a step will expose it to litigation by the oil-producing communities of the Niger Delta.¹³ In the same vein, in the case of *Allar Irou v Shell BP*,¹⁴ where the claimant sought for an injunction to restrain the defendant (Shell BP) from continuous pollution of his land, the High Court refused the request with the reasoning that granting the order would truncate activities of the defendant (SPDC), noting that mineral oil is the main source of Nigeria's revenue.¹⁵

The above reasoning, amongst others, confirms the concern earlier raised by Amasenibo to the effect that Shell is a 'big company and if we go to the Nigerian courts, they will win.'¹⁶ It is submitted that this is one of the main reasons (economic reason) most victims of environmental pollution are unsuccessful in seeking justice before Nigerian courts.

Furthermore, it is observed that the lack of access to environmental information (which includes crucial environmental education in schools), public participation in environmental decision-making as well as access to environmental justice have hindered the enforcement of fundamental rights to a clean environment.

¹²

Olanrewaju Fagbohun, *The Law of Oil Pollution and Environmental Restoration A Comparative Review* (Odade, Lagos 2010) 156.

¹³

Lawrence Atsegbua, 'Environmental rights, pipeline vandalisation and conflict resolution in Nigeria' (2001) 5 IELTR 89, 90.

¹⁴

Suit No. W/89/71, Warri High Court, November 26, 1973.

¹⁵

Allar Irou(n 14).

¹⁶

John Vidal, 'Niger delta communities to sue Shell in London for oil spill compensation' (n 3).

It is maintained that the legal burden to establish that TNCs have failed in their duty to adequately protect pipelines and other oil facilities, thereby leading to oil spills, the lack of enforcement of environmental legislation, the lack of direct legal provisions on fundamental rights to a safe environment, and the interest which government retains in oil and gas activities due to its economic benefits to the state as well as the lack of public awareness on environmental matters,¹⁷ are the key challenges confronting environmental justice in Nigeria as observed in the current research.

It is equally noted that allegations of corruption against TNCs and government agencies have contributed immensely against the attainment of environmental justice. For instance, the Special Task Force set up by the Nigerian government (under former president Goodluck Jonathan) to look into the rot in the Nigerian oil industry which was headed by Nuhu Ribadu in 2012, implicated the Nigerian National Petroleum Corporation, which is the state oil firm, ministers, government agencies and oil majors in dodgy deals and mismanagement which is estimated to have cost Nigeria \$35 billion over the last 10 years.¹⁸ It is observed that most government agencies implicated in such corruption issues are basically mandated with statutory obligations to execute court judgments or enforce policies relating to environmental pollution caused by oil and gas activities.

Nigeria's Independence and Environmental Legislation: An Evaluation Thereof

Nigeria gained independence in 1960, and before then, her legal system was substantially a replica of the English legal system, being a former British colony. In the oil and gas sector, Shell-BP's exploration licence covered the whole mainland of Nigeria, and at independence, legislative changes were introduced that allowed other oil operators to come in, (some of the companies include Gulf, Agip, Safrap (now Elf), Tenneco and Amoseas (now Texaco and Chevron) and Mobil.¹⁹ But the legislative revolution at that period was more focused on

¹⁷

See chapter 3 of this research on 'a critical analysis of the issues and challenges in environmental rights enforcement in Nigeria'.

¹⁸

Reuters, 'Exclusive: Nigeria loses billions in cut price oil deals-report' <<http://www.reuters.com/article/us-nigeria-oil-idUSBRE89N0VV20121024>> (Nigeria 24 October 2012) accessed 27 June 2017. Some of these issues are discussed in chapter 3 under figure 3.3.1.

¹⁹

Olufemi O Amao, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89, 92.

regulating activities of oil operators vis-à-vis the economic benefits to the State than the impact such activities would project on the environment. This was the case until the Koko incident of 1988. In the Koko incident, an Italian vessel dumped toxic wastes in the village of Koko, a community in Delta State of Nigeria, which sparked public outcry due to the environmental impact it had on the community and its attendant health hazards on locals. But due to the deficit of environmental laws at that time, the culprits were not prosecuted.²⁰ In this vein, Ekhatior had observed that ‘the Koko incident changed the dynamics of environmental protection in Nigeria,’ maintaining that ‘prior to the Koko incident of 1988, there were no comprehensive laws specifically regulating the Nigerian Environment’.²¹

Okon had equally confirmed the shift in environmental consciousness in Nigeria as a result of the Koko incident of 1988, when he observed that:

While it is true that Nigeria has enacted environmental legislation covering such areas as water pollution, air pollution, protection of wild life, conservation of forests, preservation of antiquities and monuments, it is also pertinent to note that environmental protection was not part of the general societal consciousness in the country until the 1988 Koko port toxic waste incident.²²

Following the Koko incident, the National Policy on the Environment was developed in 1989.²³ The goal of the Policy is to ensure environmental protection and the conservation of natural resources for sustainable development.²⁴ Thereafter, a robust statutory framework bordering on environmental liability was put in place, particularly the Harmful Waste

²⁰

Eghosa O Ekhatior, ‘Environmental Protection in the Oil and Gas Industry in Nigeria: the Roles of Governmental Agencies’ (2013) 5 IELR 196, 197.

²¹

ibid.

²²

Emmanuel E Okon, ‘The environmental perspective in the 1999 Nigerian Constitution’ (2003) 5 ELR 256, 258.

²³

The National Policy on Environment, Nigeria ‘Guiding Principles’ (1999)
<<http://www.environment.gov.ng/index.php/downloads/6-national-policy-on-environment>> accessed 4 August 2015.

²⁴

ibid para 1.2

(Special Criminal Provisions) Act,²⁵ Oil in Navigable Waters Act,²⁶ Associated Gas Re-Injection Act,²⁷ and amendments to the Oil Pipelines Act,²⁸ the Petroleum Act,²⁹ amongst others. The Oil Pipelines Act (OPA) was first enacted in 1956 following the discovery of oil in Oloibiri (the present Bayelsa State), and as observed by Mr Akenhead in the *Bodo Community* case, the OPA was basically a legislation for the creation of the oil industry in Nigeria, particularly for the transmission of any oil discovered.³⁰ Liability principles, as encapsulated in the aforementioned laws, hover around tortious principles of negligence, nuisance and the strict liability rule.³¹

The nascent environmental awareness in Nigeria can be witnessed with the recent incorporation of environmental provision in the Constitution of the Federal Republic of Nigeria 1999 (as amended). It is noted that the first time environmental provision is directly incorporated in the Constitution of Nigeria, was in 1999³² under the Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Constitution. The relevant section provides that ‘the State shall protect and improve the environment and safeguard the water,

²⁵

Cap H1 LFN 2004.

²⁶

Cap O6 LFN 2004.

²⁷

Cap A25 LFN 2004.

²⁸

Cap O7 LFN 2004.

²⁹

Cap P10 LFN 2004.

³⁰

Bodo Community (n 4) [3].

³¹

See chapter 5 of the research, particularly figure 5.3 on ‘the Nigerian legal framework and issues of environmental responsibility’.

³²

Okon (n 22) 265.

air and land, forest and wild life of Nigeria.’³³ Unfortunately, even this provision cannot be enforced against the State in any court of law by virtue of section 6(6)(c) of the same Constitution.

In view of the non-justiciability of section 20 of the Nigerian Constitution bordering on the protection of the environment, legal experts in Nigeria, in the likes of Atsegbua,³⁴ Anaebo and Ekhator,³⁵ Ruth and Chinewubeze, Jonathan,³⁶ Okon,³⁷ amongst others have alternatively given reasonable focus to the possibility of utilising the constitutional safeguards in Chapter IV of the Constitution dealing on Fundamental Rights (particularly the rights to life, dignity of human person and right to private and family life) for the protection of the environment. Basically, can incidents of environmental pollution trigger the violation of the aforesaid fundamental rights? This remains a contentious aspect of the Nigerian law, and diverse opinions have been put forward. Atsegbua had observed that if the fundamental right to a clean environment is directly inculcated in the Constitution of Nigeria 1999, and becomes enforceable, victims of oil and gas pollution will begin to assert their constitutional rights,³⁸ and constitutional rights, being given enhanced status in the Nigerian legal system, may turn around existing case law on environmental liability in Nigeria, tilting more in favour of victims of environmental pollution. The current research is focused on examining the

³³

Constitution of the Federal Republic of Nigeria 1999 (as amended), s 20.

³⁴

Lawrence Atsegbua, ‘Environmental rights, pipeline vandalism and conflict resolution in Nigeria’ (2001) 5 IELTR 89.

³⁵

Onyeka K Anaebo and Eghosa O Ekhator, ‘Realising substantive rights to healthy environment in Nigeria: a case for constitutionalisation’ (2015) ELR 17(2) 82.

³⁶

Ehusani A Jonathan, ‘Fundamental Human Right to Healthy Environment (a case for justiciability)’ (2011) Human Rights Review- An International Human Rights Journal-An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, and the National Human Rights Commission of Nigeria 2(2) July.

³⁷

Okon (n 22) 258.

³⁸

Lawrence Atsegbua (n 34) 90.

intricacies of a fundamental right to a clean environment in Nigeria and the standard of liability it would project therein, as against liability principles found in torts of negligence, nuisance and strict liability, which are seen to be prevalent in the current statutory schemes and case law on environmental pollution in Nigeria caused by oil and gas activities of TNCs.

The Right to a Healthy Environment as a Fundamental Right

It is mentioned that the correlation between environmental pollution and fundamental rights violation remains a contentious issue in many jurisdictions, in that the primary legal provisions on fundamental rights issues in Nigeria (the Nigerian Constitution) as well as in England and Wales (the European Convention on Human Rights 1950 as encapsulated in the Human Rights Act 1998) do not directly capture the right to a healthy environment. However, in chapters 2 and 6 of the current research, it has been shown that the courts, through the case law, through creative and expansive interpretation of the law, are open towards considering fundamental rights enforcement as a tool for environmental protection and preservation.

The current research has recognised the need for a new legal approach in addressing incidents of environmental pollution, through fundamental rights enforcement proceedings. It is shown that where the environment is polluted, there is bound to be an infringement of fundamental rights of victims, particularly the rights to life, dignity of human person and right to private and family life. Albeit there is insufficient case law in Nigeria to back up existence of breach of the aforementioned fundamental rights within the ambit of environmental pollution litigation, a Federal High Court (Benin judicial division), in a far-reaching judgment in the case of *Jonah Gbemre v Shell Petroleum Development Company Nig Ltd*³⁹ had maintained that sections 33(1) and 34(1) of the Nigerian Constitution,⁴⁰ which deals with the right to life and the right to dignity of human person respectively, inevitably include the right to a safe environment.⁴¹ In the same vein, the aforesaid provisions are reinforced by Articles 4, 16 and 24 of the African Charter (hereinafter ‘Charter rights’).⁴² A combined reading of the aforesaid

³⁹

[2005] AHRLR 151 (Federal High Court). The case can be found in the court records with suit No. FHC/B/CS/153/2005 (Federal High Court Benin Division) (Justice Nwokorie).

⁴⁰

Constitution of the Federal Republic of Nigeria (n 23).

⁴¹

Jonah Gbemre (n 29) 155.

⁴²

Articles provides for the rights to life and integrity, right to enjoy the best attainable state of physical and mental health, and the right to a satisfactory environment respectively, which were equally upheld by the Federal High Court in the *Jonah Gbemre* case as fundamental rights relating to a healthy environment.⁴³ At the international level, the United Nations Human Rights Committee rightly cautioned that the right to life as contained in the International Covenant on Civil and Political Rights, should not be interpreted narrowly,⁴⁴ noting further that ‘the expression “inherent right to life” cannot properly be understood in a restrictive manner’.⁴⁵

The correlation between environmental pollution and human rights violation has been affirmed by the European Court of Human Rights in the cases of *Hatton and others v United Kingdom*,⁴⁶ *Powell and Rayner v UK*,⁴⁷ *Lopez Ostra v Spain*,⁴⁸ *Guerra v Italy*,⁴⁹ amongst others. The Indian Supreme Court toed the same line in *MC Mehta v Union of India*.⁵⁰ The ECOWAS Court equally maintained the nexus between human rights and environmental

African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act Cap A9 LFN 2004.

43

Jonah Gbemre (n 39) 155.

44

UN Human Rights Committee, General Assembly Comment No. 6: Article 6 (Right to life) UN Doc HRI/GEN/1/Rev 1 at 6 (1994) para 1.

45

UN Human Rights Committee (44) para 5.

46

[2003] 37 EHRR 611, [2003] All ER (D) 122.

47

[1990] 12 EHRR 355, [1990] ECHR 9310/81.

48

[1994] 20 EHRR 611, [1994] ECHR 16798/90.

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[1998] 26 EHRR 357, [1998] 4 BHRC 63.

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[1987] AIR SC 1086.

pollution in *Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria*.⁵¹ In the communication of *Social and Economic Rights Action Centre (SERAC) and Another v The Federal Republic of Nigeria*,⁵² the African Commission held the Nigerian government liable for the violation of the Charter rights (particularly Articles 4, 16 and 24 of the Charter on the rights to life and integrity, enjoyment of physical and mental health, and satisfactory environment respectively)⁵³ due to oil and gas activities resulting to environmental degradation and health problems among the Ogoni people of the Niger Delta. In its final ruling, the Commission stated that:

These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.⁵⁴

The African Commission, particularly went further to establish the nexus between the right to life and environmental pollution when it observed that ‘Given the widespread violations perpetrated by the government of Nigeria and private actors, the most fundamental of all human rights, the right to life has been violated.’⁵⁵ However, it is made clear in chapter 3 that after the latter ruling and others, the Nigerian government has taken various steps to remedy environmental challenges in the Niger Delta region.⁵⁶ In view of the foregoing, it has been established through a series of case law and legal provisions that there is arguably a

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[2012] Community Court of Justice, ECOWAS (Judgment N0 ECW/CCJ/JUD/18/12).

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[2001] AHRLR 60 Communication 155/96, decided at the 30th ordinary session, October 2001 of the African commission.

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African Charter (n 42).

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SERAC (n 52) [51].

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SERAC (n 52) [67].

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See figure 3.3.1. The establishment of the Niger Delta Development Commission, the Niger Delta Ministry, the Niger Delta Amnesty Programme, and of recent, measures taken for the Ogoni Oil Clean-up amongst others, are landmarks with a view to curbing environmental challenges and the general welfare of the region.

fundamental right to a healthy environment, whilst equally noting that the issue remains contentious.

The Gap in the Current Law: The Lack of Enforcement of Environmental Rights in Nigeria

Having examined the current challenges facing environmental justice in Nigeria, particularly with regard to the standards of liabilities applicable in the common law torts of negligence, nuisance and under the strict liability rule and their attendant technicalities and loose nature which are partially incorporated into the Nigerian statutory scheme on environmental liability,⁵⁷ the current research has opted for a turnaround in the environmental justice system by considering the possibility of obtaining a stricter liability/or even absolute liability as a solution.

Although the strict liability rule is considered by some writers as a ‘no fault liability rule’,⁵⁸ this is a misnomer, owing to the numerous defences attached to the rule. Hence, it is maintained that on a scale of zero to ten (0-10), where 5 represents ‘strict liability’ and 10 represents ‘absolute liability’, environmental liability under fundamental rights enforcement, as argued in the current research should be pinned under 9, with limited space left for illegal activities of ‘third parties’ where pollution is shown to be manifestly unavoidable in events relating to illegal oil bunkering and acts of sabotage by vandals.⁵⁹ This premise is predicated on the outcome of the judgment in *Jonah Gbemre v SPDC* by a Federal High Court in Nigeria declaring a major traditional defence of ‘statutory authority’, permitting TNCs to flare gas, which is applicable under the strict liability rule, laws of negligence and nuisance, and which is reflected in extant environmental statutes and regulations, inconsistent with the constitutional rights to life and dignity of human person.⁶⁰ Even with the aforesaid premise, it

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McConnell (n 5) 53.

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See Ayodele O Akinsola, ‘Civil Liability for Oil Pollution under Nigerian Law’ *The Nigerian Institute of Advance Legal Studies (Journal of Law and Public Policy)* 293 <<http://www.nials-nigeria.org/journals/Ayodele%200ladiranlawp>> accessed 4 June 2014. See also figure 1.5 on the basic defences to the strict liability rule.

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The justification for this proposition is argued in chapter 6 of this research, particularly in figures 6.4, 6.4.1, 6.5 as well as 6.6 with regard to the strict position of the Indian courts on environmental liability. This proposition cannot be applicable to the enforcement of Conventions rights in the UK owing to the defences against enforcement of the Convention rights.

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is argued that liability ought to be absolute in that such activities of ‘third parties’ are foreseeable and the defence of ‘act of third parties’, ordinarily, should not hold because TNCs have foresight of such activities. If TNCs are proactive and diligent enough in curbing pollution, they would substantially forestall such acts of ‘third parties’ owing to the obligation of government and TNCs to protect oil and gas facilities,⁶¹ particularly within the perspective of fundamental rights enforcement.⁶² It follows that, where government and TNCs are shown to have contributed to environmental pollution, either by commission or omission, liability should be absolute, but in practical terms, an argument for breach of environmental rights would project a stricter liability than the common law strict liability rule.

Contemporary legal literature in Nigeria and other relevant jurisdictions considered in this research have shown intellectual reasoning, drawing analogies from legal instruments and case law, regarding whether there can be an argument for breach of the fundamental rights to life, dignity of human person and private and family life (hereinafter ‘fundamental right to a clean environment’) in events of environmental pollution.⁶³ But it is observed that no adequate attempt has been made to compare the measure of liability that can be obtained from the fundamental right to a safe environment with comparative analyses to other measures of liabilities in the applicable common law principles for environmental pollution (such as negligence, nuisance and the strict liability rule) which have gained entrance into extant legal framework and case law on environmental pollution adjudication in Nigeria. The comparison proves to be necessary on the basis that fundamental rights are basically given higher status over other rights and there could be the practical possibility that these rights would generate a higher standard of liability to curb incessant cases of oil and gas pollution in

Jonah Gbemre (n 36) 155.

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See the *Bodo Community Case* (n 4) [93] on the possibility for an absolute liability against TNCs where damage is foreseeable and preventable under the traditional rules of liability and the Oil Pipelines Act 2004.

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See the argument for a stricter or absolute liability under environmental rights enforcement in figures 6.4, 6.4.1 and 6.5

⁶³

See Chapter 2 of the research on ‘awareness of fundamental rights as a tool for environmental protection’, particularly figures 2.3 and 2.5 for England and Wales and Nigeria respectively. See also figure 6.6 of chapter 6 on the correlation between the right to life and environmental protection in India.

Nigeria, thereby enabling victims of environmental pollution to push for constitutional rights to a healthy environment on one hand, whilst ensuring higher responsibility from the part of TNCs on the other. It is this gap in the standard of liability between these two approaches to environmental justice that the current research seeks to examine and fill. In this vein, it is hoped that the current research will have a significant impact on the human right community in Nigeria and related jurisdictions on the imperatives in enforcing environmental rights.

It is submitted that the analysis in the current research focusing on the major challenges to environmental justice, such as the lack of public awareness on environmental matters and the economic benefits of the state in oil and gas activities would generate a reconsideration of the dynamics in the enforcement of fundamental environmental rights.

How may the Current System be Improved?

It is submitted that the legal hurdles encountered by victims of oil and gas pollution in Nigeria in proving cases of environmental pollution against TNCs are associated with the nature of the prevailing standards of liability retained by the courts. At present, the duty to prove negligence on the part of TNCs is more utilised by the Courts.⁶⁴ It is submitted that due to the technicalities involved in proving negligence,⁶⁵ an argument for breach of fundamental rights to healthy environment would generate a stricter liability as well as curb the common defence of ‘statutory authority’ and others usually advanced by TNCs as shown in the *Jonah Gbemre* case,⁶⁶ and this would be more feasible where there are direct constitutional provisions for fundamental rights to healthy environment.

With regard to the lack of public awareness on environmental matters as a key challenge confronting environmental justice in Nigeria, the research has proffered solutions for improved access to available environmental information;⁶⁷ which entails adequate education

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See the *Bodo Community Case* (n 4) [93]. See also section 11(5)(b) of the Oil Pipelines Act (n 20).

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It is observed that oil operations involve the use of high technology, and victims of oil pollution would be confronted with the task of showing that TNCs were negligent in handling such technology.

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Jonah Gbemre (n 39).

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See figure 4.3 on access to information on environmental issues.

on environmental matters,⁶⁸ public participation in environmental decision making⁶⁹ as well as access to justice. With regards to access to justice, State High Courts in Nigeria lack jurisdiction to entertain matters bordering on oil mining,⁷⁰ except the argument raised under fundamental rights actions in chapter 4 relating to environmental rights.⁷¹ It is recommended that the Nigerian Constitution be amended to openly pave way for State High Courts to retain concurrent jurisdiction alongside Federal High Courts in entertaining matters on oil and gas exploration and production. This is due to the limited number of Federal High Courts as against State High Courts which currently maintain divisions in almost every local government in Nigeria.⁷²

On the best solution to ‘economic benefits of oil and gas activities’ which has been identified as a barrier to the advancement of constitutional rights to a healthy environment, John Gordon’s advice on maintaining moderate approaches to environmental liability issues as quoted in Abel’s article⁷³ would be instructive here. Gordon aptly stated that:

I suggest there is little profit for anyone in extreme positions. Resource development must go on; otherwise we shall all starve. The environment must be protected; otherwise man and all living things will perish.⁷⁴

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See figure 4.3.2 on education in environmental matters.

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See figure 4.4 on public participation in environmental decision making.

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See section 251(1) (n) of the Nigerian Constitution (n 33) on the exclusive jurisdiction of Federal High Courts on causes of action arising from oil mining. See also *Shell Petroleum Development Company of Nigeria Ltd v Abel Isaiah and others* [2001] 2NWLR (Pt 723) (SC).

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See figure 4.5.1 on access to environmental justice and jurisdiction of courts.

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See figure 4.5.1 on access to environmental justice and jurisdiction of the courts.

73

Wolman Abel, ‘Global Pollution and Human Rights’ (1972) 12 NRJ 195.

74

Abel (n 73) 201.

Whilst noting that Gordon's stance above deserves support, it is maintained that fundamental rights must not be sacrificed on the altar of profit-making, and bearing in mind the enhanced status attached to fundamental rights, it is suggested that the courts should be more inclined to enforce environmental rights, particularly via a creative and expanded interpretation of the rights to life, dignity of human person and private and family life, in the absence of direct provisions to a healthy environment.

Also, to support the locals in areas more prone to oil and gas pollution, government and TNCs must jointly promote direct Special Funds and Committees to aid in the dissemination of environmental information as well as improve the lives of inhabitants of oil producing communities with a view to curbing incessant breach of environmental rights. Furthermore, the Human Right Community, particularly, environmental activists whom the current research is more useful to, would have to constantly advance bills (on environmental rights) to legislators as well as promote awareness on environmental rights.

Hypotheses

The current research is entitled, 'the doctrine of absolute liability and the right to a safe environment: issues and challenges in the liability of environmental polluters in Nigeria'. In explaining the content of the research, the following hypotheses are formulated:

1. Is there any legal nexus between environmental pollution and breach of fundamental rights ('rights to a healthy environment') of people?
2. Whether the current techniques of measuring liability, particularly under tort law is sufficiently clear in Nigerian law.
3. Whether public awareness may contribute to reduce the risk of environmental pollution.
4. Whether the doctrine of absolute liability may be applied to the issue of the protection of the environment when the protection has been disregarded by TNCs within the ambit of fundamental rights enforcement.⁷⁵

It is observed that the common law doctrine of strict liability as shown in the case of *Rylands v Fletcher*⁷⁶ imposes liability on environmental polluters where it is shown that the defendant

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Traditionally, environmental liability principles in Nigeria are fault-based. See section 11(5) of the Oil Pipelines Act (n 8).

⁷⁶

has brought ‘dangerous things’ to its land which is in ‘non-natural use’ of the land, which eventually escapes to cause damage to the claimant, without any need for the claimant to establish fault on the part of the defendant. Whilst the strict liability rule has been highlighted as a unique principle in the law of tort, particularly for isolated escapes of dangerous things,⁷⁷ many legal experts have argued that in practical terms, the strict liability doctrine is similar to torts of nuisance and negligence, submitting that the strict liability rule is on its death bed.⁷⁸ Even suggesting that there would be no circumstance where a claimant would succeed under strict liability principle without succeeding in negligence and nuisance.⁷⁹ In view of this latter position, it is maintained that in the absence of the defence of ‘statutory authority’, the strict liability rule maintain its uniqueness. In the context of oil and gas activities, it is clear that government, in almost all cases authorises the activities of TNCs via issuance of licences,⁸⁰ and in this vein, claimants would be obligated to prove that oil operators acted negligently or unreasonably in causing the alleged injury suffered, even if the strict liability rule is pleaded. This aligns the standard of liability under the strict liability rule with that required in nuisance and negligence, which basically forms legal requirements for establishing liability in most of the statutes on environmental pollution liability in Nigeria.⁸¹ This explains the reason why judges seem to apply the aforesaid common law principles collectively in most environmental pollution claims, although these common law rules retain their legal uniqueness, they share many similar features. For example, in the *Bodo Community* case, the claimants based their claims on private and public nuisance, negligence, *Rylands v Fletcher* rule and under the Oil

[1861-73] All ER Rep 1 (HL).

77

Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 AC 264 (HL), 306 (Lord Goff).

78

Peter M Gerhart, ‘The Death of Strict Liability’ (2008) 56 BLR 245, 246.

79

John Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24 OJLS 643.

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In the Nigerian case of *San Ikpede v Shell Petroleum Development Company Nigeria Ltd* [1973]MWSJ 61 the court refused to apply the strict liability rule noting that oil and gas activities of TNCs are under the exception of ‘statutory authority’.

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See Oil Pipelines Act (n 28), s 11(5)(b).

Pipelines Act in Nigeria.⁸² Although, it is shown that the strict liability rule, as expounded in *Rylands v Fletcher* encompasses certain features which are considered unique, the rule arguably shares major similarities with claims relating to torts of nuisance and negligence as well.⁸³

Again, a question may be raised on why much attention is given to the analysis of the measure of liability obtainable in the aforesaid common law principles? It is worth noting that the research is aimed at establishing a triangular assessment of standards of liabilities in common law and the prevailing environmental statutory regimes with a view to examining their relationship with the standard of liability in fundamental rights enforcement actions within the sphere of environmental pollution. This is done to justify the emphasis given to the latter in the current research as it offers a more effective means of seeking justice.

The step beyond the strict liability principle is the doctrine of absolute liability. Under absolute liability, where the cause of pollution can be traced to the defendant, it would result in them being directly liable to the claimant⁸⁴ without any of the defences of statutory authority, Act of a third party, and others as discussed in chapter 1.⁸⁵ Such liability within the framework of fundamental rights enforcement, is linked to an ‘absolute right’ to a clean environment, without any need for oil operators to prove exercise of due care or reasonableness in conduct, statutory authority and act of a third party, provided the oil spill and/or gas flaring in the circumstance has infringed the rights to life, dignity of the person or enjoyment of private and family life of inhabitants, as the case may be.

Going further, it is shown that the correlation between environmental pollution and fundamental rights violation is not a settled one, in that the primary legal provisions on human rights issues in England and Wales as well as in Nigeria do not comprehensively

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Bodo Community (n 4) [9]

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See figures 1.4 and 1.6 of chapter 1 on the link between the strict liability rule and the torts of nuisance and negligence.

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Andrew Waite, ‘The quest for environmental law equilibrium’ (2005) 7 ELR 34, 39.

⁸⁵

See figure 1.5 on the basic defences to the strict liability rule.

encapsulate the right to a clean environment. However, in chapters 2 and 6 of the research, it has been shown that the courts, through case law, are open towards considering fundamental rights enforcement as a tool for environmental protection. It is submitted that the denial of the existence of the aforementioned rights, and alleged economic marginalisation of locals in Nigeria, particularly in the Niger Delta region, are responsible for a series of protests, sabotage on oil and gas facilities, civil unrests, and consequently under-development of the region.

It is certain that approaching the courts via fundamental rights enforcement proceedings in events of environmental pollution would facilitate a speedy dispensation of justice due to the urgent nature for disposing such matters and the legal importance attached to such rights as emphasized in the Fundamental Rights (Enforcement Procedure) Rules, 2009.⁸⁶ Equally, an application for the enforcement of fundamental rights under the Rules cannot be affected by any limitation statute whatsoever.⁸⁷ It is in view of these advantages, among others, that the researcher elected to reconsider environmental litigation but within the framework of fundamental rights enforcement with the aim of offsetting some of the major procedural challenges (particularly on the standard of liability) encountered in the prevailing common law and statutory liability proceedings as can be seen under the strict liability rule, nuisance, negligence and various statutes relating to environmental liability as discussed.

A pertinent question to address is whether the advancement of fundamental rights relating to environmental pollution issues will deter TNCs and/or the Federal Government from activities that would harm the environment or disregarding environmental protection? It is worth mentioning that fundamental rights, in view of their nature are conventionally given enhanced status over and above other rights, and if utilised within the sphere of environmental pollution will secure higher standards of environmental liability and consequently promote a more quality ecological system. It is observed in chapter 6⁸⁸ that an absolute liability regime under fundamental rights will ensure a more transparent,

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See FREP Rules 2009, Ord IV, r 2.

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ibid, Ord III, r 1.

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See figure 6.3 entitled 'The Rationale for an Absolute Liability Regime'.

accountable and efficient compensation regime, than the arbitrary and isolated application of common law principles. However, Bukola Saraki (in the Nigerian Senate) had maintained that due to the lack of penalties and cost framework, much of the spills in Nigeria have been ‘ignored, neglected and in most cases never cleaned up or the sites remediated’.⁸⁹ In the same vein, Atsegbua had observed that ‘the denial of the existence of environmental rights is primarily responsible for the underdevelopment of the Niger Delta area.’⁹⁰ It follows that if environmental rights, as argued in this research are given consideration by the Nigerian courts, and judgments are enforced by relevant government agencies, corruption issues relating to negligent handling of oil and gas pollution incidents by the Nigerian Government and TNCs will be curbed to a high degree.

In view of the complex nature of the concept of ‘human rights’, a conscious attempt is made to differentiate between human rights and fundamental rights, and to demystify both terms. Whilst the former is considered an umbrella concept, capturing a wide range of rights; both enforceable and unenforceable rights,⁹¹ fundamental rights are rights only recognised and enforced by legal instruments and governments due to their significance. For example, Chapter IV of the Nigerian Constitution focusing on enforceable rights is entitled as ‘Fundamental Rights’, connoting the significance and sacredness of the rights therein. Again, the Fundamental Rights Enforcement Procedure Rules 2009 in Nigeria (the FREP Rules), defined the term, ‘Fundamental Right’ as ‘any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and People’s Rights (Ratification and Enforcement) Act’,⁹² meanwhile ‘human rights’, according to the FREP Rules, ‘include fundamental rights’,⁹³ and human rights in this context could be

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Henry Umoru, ‘Nigeria has highest oil spill in the world’ Vanguard News (Nigeria, 14 November 2012) <<http://www.vanguardngr.com/2012/11/nigeria-has-highest-oil-spill-in-the-world-senate/>> accessed 15 August 2015.

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ibid 90.

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Some of the human rights provisions captured in international treaties are precatory in nature due to lack of instrumentality for enforcement.

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FREP Rules 2009, Ord I, r 2.

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linked with conventions, treaties and policy documents promoting rights which can be persuasive in arguments for fundamental rights proceedings. For example, under the Preamble to the Fundamental Rights (Enforcement Procedure) Rules 2009 in Nigeria, the courts are expected to give credence to regional, international and other bills of rights for the purpose of advancing the applicant's rights and freedoms.⁹⁴ This does not necessarily presuppose that such bills of rights are enforceable; but they contain human rights provisions. The conundrum relating to the significance and use of the aforesaid terms is discussed in chapter 2 of this research.⁹⁵ It is admitted that the terms are still used interchangeably without being seen as a misnomer; perhaps it is an issue of legal jurisprudence based on choice of terms, perception, the jurisdiction in question and the context which it is being applied. Nevertheless, this researcher is obliged to discuss 'human rights' because of the popular usage of the term to refer to 'rights' as a whole, but the current research is inclined toward advancing environmental pollution incidents as a matter of fundamental rights violation.

Utilising fundamental rights enforcement proceedings as a legal tool in environmental pollution litigation is not without challenges.⁹⁶ Whilst observing the jurisdiction of the European Court on Human Rights as well as the English Courts, it is shown that the courts do retain substantial discretion in over-ruling individual rights in a system of priorities where the economic benefits of the state is involved. In essence, the courts are obliged to strike a balance between the interest of the individual and that of government in cases for the enforcement of Convention rights, thereby anchoring liability on the 'reasonableness' of conducts of public authorities. This is affirmed by the Grand Chamber of the European Court of Human Rights in the case of *Hatton and others v United Kingdom*,⁹⁷ and later reaffirmed by the House of Lords (now Supreme Court) in the English case of *Marcic v Thames Water*

ibid.

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FREP Rules 2009, Para 3 (b) of the Preamble.

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See figure 2.2 entitled: 'what are human rights?'

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Chapter 3 and 4 of the research identifies economic factors and lack of public awareness as some of the hassles in enforcement of environmental rights.

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[2003] 37 EHRR 611, [2003] All ER (D) 122.

*Utilities Ltd.*⁹⁸ The aforesaid approach is otherwise referred to as the doctrine of the *Margin of Appreciation* as first developed by the European Court of Human Rights in the case of *Powell and Rayner v UK*.⁹⁹

It is submitted that the doctrine of the *margin of appreciation*¹⁰⁰ as reflected in decided cases discussed in the body of the research is capable of frustrating successful pursuit of fundamental rights, in that fundamental rights, due to their sacred nature, should be given higher priority over economic issues and must not be seen to be undermined on the grounds of profit-making by the State. This, raises a big question mark on the ‘significance’ of the Convention rights, and generates the need for further considerations on the difference between liability under the Convention’s rights and common law tort principles relating to environmental pollution as discussed in the research. Hence, it is asked: why are Convention rights generally adjudged to be of higher status to other rights if liability for breach of such rights is predicated on the ‘reasonableness of conduct’ of public authorities or on the margin of appreciation principle? It is shown in chapter 2 of the research that in case-law analysis, the same measure of liability applied in the law of nuisance and negligence is deployed in determining violation of Convention rights in England and Wales as encapsulated in the Human Rights Act 1998.

A critical analysis of some of the problems encountered in fundamental rights enforcement proceedings are discussed, and one of these is the ‘economic factor’. It is noted that most of the European Court of Human Rights cases mentioned in chapter 2 of this research are predicated on Article 8 of the European Convention on Human Rights and Fundamental Freedoms (Hereinafter ‘the Convention rights’)¹⁰¹ which borders on the right to respect for individuals’ private and family life, his home and his correspondence, and the grounds under

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[2003] UKHL 66, [2004] 2 AC 42.

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[1990] 12 EHRR 355, [1990] ECHR 9310/81.

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This doctrine as first utilised in the case of *Powell and Rayner v UK* (n 99) by the ECtHR connotes the balancing of interests between the rights of the individual and the interest of the state. See figure 2.3 on the discussion relating to the doctrine.

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The European Convention on Human Rights and Fundamental Freedoms 1950.

which such rights can be interfered with were mentioned to include: national security, public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights and freedoms of others as well as the for the economic well-being of the country.¹⁰² A similar provision to that of Article 8(1) of the Convention rights in Nigeria can be found in section 37 of the Nigerian Constitution (right to private and family life) and the same exceptions applicable to Article 8(1) as seen in Article 8(2) of the Convention rights are equally attached to the right to private and family life as seen in section 45(1)(a) and (b) of the Nigerian Constitution, except the defence relating to the ‘economic well-being of the state’ which is clearly missing in the Nigerian Constitution. This, as argued, ordinarily presupposes that the individual’s right to private and family life in Nigeria could not be interfered with for the purposes of the ‘economic benefits’ of the state (economic grounds). Despite the absence of this defence, it is theoretically explained in chapter 3 that due to the benefits which government derives from oil and gas activities, the enforcement of fundamental rights relating a safe environment have been dimmed.

Furthermore, it is mentioned that the lack of public awareness on environmental matters has affected the pursuit of fundamental rights relating to a safe environment. Due to the significance and intricate nature of this challenge, chapter 4 of this research has been dedicated to it, taking into cognisance relevant international treaties, domestic laws in Nigeria as well as in England and Wales. It is concluded that the lack of access to environmental information, which includes crucial environmental education in schools, public participation in environmental decision-making as well as access to environmental justice have truncated the enforcement of fundamental rights to a clean environment. In view of this, this research proffered solutions with a view to expanding the frontiers of fundamental rights enforcement with regard to oil and gas pollution incidents in Nigeria.

Going further to the focal point of this research, which borders on the standard of liability obtainable in fundamental rights enforcement proceedings relating to environmental pollution, the research delved into issues of state responsibility and environmental protection. The research critically examined the interplay of national and international laws with a view to ascertaining the measure of liability obtainable in legal proceedings relating to environmental pollution. Liability principles under the Oil Pipelines Act 2004 (OPA) are generically utilised as the benchmark for standards of liability in the Nigerian environmental

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liability regime, particularly for compensation claims relating to oil spills, and this hovers around principles of the torts of nuisance, negligence and strict liability doctrine as discussed in Chapter 1 of this thesis. This latter position was corroborated by Mr Akenhead in the *Bodo Community* case¹⁰³ to the effect that ‘there is a sufficiently comprehensive code within the OPA to cover the key aspects of the whole process involved in the pipelines,’¹⁰⁴ and that the statutory scheme of the OPA retains a wider scope than the common law principles in nuisance, negligence and the rule in *Ryland v Fletcher*.¹⁰⁵ Nevertheless, the aforesaid common law principles, underpins the applicable measure of liability found in the various statutory regimes relating to environmental liability for oil and gas activities.

At an international level, the decision of the International Court of Justice (ICJ) in *Argentina v Uruguay*¹⁰⁶ (hereinafter ‘the Pulp Mills Case’), serves as a pointer on the standard of liability involved. The primary obligation according to the Stockholm Declaration and other significant world treaties is that states must take responsibility to ensure that activities within their jurisdiction and control do not cause damage outside of their jurisdiction, and where damages occur due to activities of states, states will have to cooperate to develop further the international law regarding liability and compensation for victims of pollution caused by activities within the jurisdiction or control of such states to areas beyond their jurisdictions; and in line with the *Pulp Mills* Case, the ICJ observed that the principle of prevention, as a customary rule has its origins in the due diligence that is required of a state in its territory, and according to the ICJ, such principle ‘is now part of the corpus of international law relating to the environment’.¹⁰⁷ It is submitted that the element of ‘due diligence’ is a key requirement which the defendant must raise to escape liability in the tort of negligence.

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Bodo Community Case (n 4).

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ibid [64] (a) (Mr Akenhead).

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ibid [64] (d).

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Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep14.

107

Pulp Mills (n 106) para 101.

Another remarkable international document regarding liability for oil pollution, is the International Convention on Civil Liability for Oil Pollution Damage 1969 (later revised and amended in 1992), which provides that a ship owner is strictly liable for the damage caused to a sufferer of an oil spill, and the same exceptions under which a defendant can absolve liability under the strict liability doctrine are in line with those listed in the Convention except the defence of statutory authority.¹⁰⁸ This is understandable since such a defence could not be applied at the international level as a single state would not be obliged under international law to permit pollution of any sort. The question to ask is: what do we stand to achieve in discussing liability as a whole in a research that is fundamental rights based? The fact remains that: discussing the standard of liability obtainable in fundamental rights enforcement proceedings without a focus on ordinary liability principles would render the research nugatory. In examining liability for ordinary claims and the bottlenecks involved, explains the need for higher responsibility on the part of polluters which fundamental rights proceedings potentially offers.

It is proposed that there is no incompatibility between incidents of environmental pollution and fundamental rights violations. Whilst the Nigerian Constitution under Chapter IV made provisions for the rights to life, dignity of the human person, and the right to private and family life, Article 24 of the African Charter (which is now a municipal law in Nigeria) is more explicit and direct on the fundamental right to a safe environment. It provides that ‘all peoples shall have the right to a general satisfactory environment favourable to their development’.¹⁰⁹ It is interesting to note that the Fundamental Rights (Enforcement procedure) Rules 2009, under Order II Rule 1 recognises provisions in the African Charter as ‘fundamental’ alongside the fundamental rights provisions contained in Chapter IV of the Nigerian Constitution.

The aforesaid rights have been theoretically described in the current research as ‘absolute rights’, in that looking at the various exceptions or conditions under which they can be infringed, there is no such exception that would exonerate environmental polluters if the rights are to be interpreted from a human rights perspective. This is further buttressed by the

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International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November) 1969, art III.

¹⁰⁹

African Charter (n 42).

judgment of the Federal High Court (Benin Division) in *Jonah Gbemre v Shell Petroleum Development Company Nig Ltd*¹¹⁰ to the effect that section 3(2)(a) and (b) of the Associated Gas Re-Injection Act,¹¹¹ as well as section 1 of the Associated Gas Re-Injection (continued flaring of Gas) Regulations, section 1.43 of 1984, under which gas flaring may be permitted are inconsistent with the applicant's rights to life and or dignity of human person as captured in sections 33(1) and 34(1) of the Nigerian Constitution respectively, and articles 4, 16 and 24 of the African Charter, having regard to the supremacy of the Nigerian Constitution and the fundamental nature of the rights captured under the African Charter.¹¹² This automatically suppresses the traditional defence of 'statutory authority' commonly furnished by oil operators in environmental pollution claims. It follows that, the absolute nature of the aforementioned guaranteed rights can only be argued within the framework of fundamental rights based arguments on environmental issues, but not with the other circumstances clearly indicated by the Constitution as exceptions.¹¹³

It is further maintained that at the regional level, the ECOWAS Court of Justice and the African Commission in a handful of cases have utilised a standard of liability relating to environmental pollution damage, even within a human rights perspective that is in line with the requirement of the tort of negligence. It is shown that states must exercise 'vigilance and diligence' in their handling of environmental matters in order not to violate environmental rights. The ECOWAS Court whilst putting blame on governments' negligence on handling environmental issues, was specific on its measure of liability in the case of *Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria*,¹¹⁴ when it

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Jonah Gbemre (n 39).

¹¹¹

See Figure 5.3.4 on the provisions and discussion vis-à-vis the Power of the Minister of Environment to issue permit on gas flaring under the Associated Gas Re-Injection Act.

¹¹²

Jonah Gbemre (n 39) 155.

¹¹³

See figure 6.4 on the deductive argument for an absolute liability for environmental polluters in fundamental rights enforcement proceedings.

¹¹⁴

[2012] Community Court of Justice, ECOWAS (Judgment N0 ECW/CCJ/JUD/18/12).

said that ‘it is this omission to act, to prevent damage and to hold accountable, environmental polluters that has characterised the violations of the Charter rights’.¹¹⁵ It is submitted that this latter position of the court is in line with the standard of liability in the tort of negligence.

Furthermore, whilst drawing an analogy with the Indian jurisdiction with regards to the measure of liability obtainable in breach of fundamental rights in environmental pollution incidents, the Supreme Court of India observed in *MC Mehta v Union of India*,¹¹⁶ that an enterprise engaged in inherently dangerous activities which poses threat to health and safety of inhabitants owes an absolute duty to the community to ensure that no harm results to anyone. In essence, Indian courts have interpreted the constitutional right to life to include environmental protection,¹¹⁷ and it is in line with the *MC Mehta* case and others that the argument for an absolute liability is raised in the Nigerian jurisdiction through the instrumentality of the Nigerian Constitution and the African Charter, whilst drawing judicial support from the judgment of *Jonah Gbemre* at the Federal High Court in chapter 6 of the research.

A further question on the argument for absolute liability is whether the polluter will be liable for breach of environmental rights where the pollution incident is traceable to acts of sabotage by third parties? It is worth noting that the Federal High Court in *Jonah Gbemre* did not tackle the issue. However, in *FA Akpan & Anor v Royal Dutch Shell & Anor*,¹¹⁸ the second plaintiff (Melieudefensie) moved for a declaratory judgment whilst making reference to the *Jonah Gbemre* case in a Dutch Court to the effect that SPDC was liable for affecting Akpan’s (first plaintiff) right to physical integrity due to the contamination of his environment. The District Court of The Hague, in turning down the request, reasoned inter alia, that in *Gbemre*, the Court ruled that SPDC had infringed a human right by its ‘active

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SERAP (n 51) [111]. The ‘Charter Rights’ is used to refer to the African Charter on Human and Peoples Rights.

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[1987] AIR SC 1086.

¹¹⁷

Gitanjali N Gill, ‘Human Rights and the Environment in India: Access through Public Interest Litigation’ (2012) 14 ELR 200.

¹¹⁸

Akpan (n 2).

conduct' by deliberately flaring gas during a long period, whereas, in the *Akpan* case, SPDC could not be blamed for any active conduct, except negligence. Noting that there have been no Nigerian rulings in which an event of sabotage by third parties is considered to be an infringement of a human right.¹¹⁹ The position of the District Court of Hague, deserves support. Notwithstanding, the current argument for absolute liability is anchored in the fundamental nature of the rights captured in Chapter IV of the Nigerian Constitution, and in this regard, it is maintained that government owes a duty to preserve the aforesaid rights, and this entails securing oil and gas facilities in order not to violate rights of law-abiding citizens. In view of the aforesaid, particularly with regard to the *Akpan* case above, it is maintained that liability under environmental rights enforcement will be stricter than the measure of liability as obtainable under the strict liability rule.

It is admitted that the limitation of the argument in the current research lies in the fact that the Judgment of the Federal High Court in *Jonah Gbemre* is subject to further validity test in that the Court of Appeal and the Supreme Court are yet to make similar rulings on that same position.

Methodology

Chatterjee has given a comprehensive overview of what a research design connotes. He states that 'Research design is concerned with the structure, plan and method(s) of investigation with a view to reaching acceptable answers to research questions',¹²⁰ and one of the most important objectives of a research is to 'collect information with a view to solving problems'.¹²¹ In the current research, information is collated to test some hypotheses, and the most significant of all in the current research, is to examine 'Whether the doctrine of absolute liability may be applied to the issue of the protection of the environment when the protection has been disregarded by TNCs within the ambit of fundamental rights enforcement'. It is observed that victims of environmental pollution in Nigeria customarily seek for legal redress relying on common law torts principles and statutory liability provisions, and these methods,

¹¹⁹

Akpan (n 2) 4.56.

¹²⁰

Charles Chatterjee, *Methods of Research in Law* (2nd edn, Old Barley Press 2000) 16.

¹²¹

ibid.

as observed could no longer sustain an effective redress of recurrent injuries suffered by inhabitants of oil pollution areas and serious ecological harm caused by activities of oil and gas exploration and production in Nigeria by oil operators, particularly in the Niger Delta Region. A group of issues have been identified by the researcher as impediments to effective environmental justice, and as observed earlier with particular concern, are the numerous legal defences raised by the oil operators to escape liability, particularly the defences of ‘statutory authority’ and ‘act of a stranger’.

Morris and Murphy, whilst commenting on the importance of legal research methodologies reasoned that ‘there is no one right methodology or perfect methodology and you may find that your work incorporates one or more methodologies depending on the nature and needs of your research.’¹²² The current research utilised a mixed method of Black Letter Law, Socio-Legal and a Comparative Legal Analysis approaches in exploring the gaps in knowledge as well as addressing and testing the aforementioned hypotheses.

The researcher basically utilised a black letter law approach (or the doctrinal method) in the sense that there is a substantial reliance on case law, scholarly journals, articles, statutes, principles of law¹²³ to systematically establish the correlation and consistency between environmental pollution and human rights violation as well as the absolute nature of the rights to a pollution-free environment (environmental rights). Initial effort is made to establish the premise that environmental pollution would inevitably infringe fundamental rights of victims and then the key principles of liability under common law torts and statutes are applied to such environmental breaches on one hand, and a further consideration is given to constitutional guaranteed rights and fundamental rights in the African Charter relating to environmental protection with a view to ascertaining the measure of liability on the other. In this vein, Morris and Murphy whilst explaining the nature of Black Letter or Doctrinal Analysis methodology aptly observed that:

The role of the black letter lawyer is to bring consistency and coherence to a set of rules that might appear at first glance to be an unrelated or jumbled mass...once the premise is discerned,...then the law can be

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Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011) 29.

123

Michael Salter and Julie Mason, *Writing law dissertations: an introduction and guide to the conduct of legal research* (7th edn, Pearson Longman 2007) 49.

assessed for compliance with relevant principle(s) and explained according to that framework.¹²⁴

Morris and Murphy observed that the Black Letter or Doctrinal Analysis ‘focuses almost entirely on law’s own language of statutes and case law to make sense of the legal world’,¹²⁵ and this is basically carried out by way of deductive reasoning and arguments by analogy.¹²⁶ In the same vein, Hutchinson had observed that:

The doctrinal method is normally a two-part process involving both locating the sources of the law and then interpreting and analysing the text...this step involves the use of reasoning and problem solving skills such as deductive logic, inductive reasoning and analogy.¹²⁷

It is shown in the course of the research that apart from the African Charter¹²⁸ which clearly provides for the right to a ‘satisfactory environment’, the fundamental right to a clean environment is inductively derived from the rights to life, dignity of human person and private and family life, and in this regard, analogies were drawn from case law, depicting how the courts have expansively and creatively interpreted the aforesaid rights to include the right to a safe environment.

Whilst showcasing the difference between Black letter law and the Socio-legal approach, Morris and Murphy maintained that the socio-legal method looks beyond legal doctrine to understand law as a social phenomenon. In view of this, most legal researchers have considered the socio-legal approach as ‘law in action’ rather than ‘law in books’.¹²⁹

¹²⁴

Morris and Murphy (n 122) 31.

¹²⁵

Morris and Murphy (n 122) 31.

¹²⁶

ibid 31.

¹²⁷

Terry Hutchinson, ‘Doctrinal research: researching the jury’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 13.

¹²⁸

African Charter (n 42)

¹²⁹

Morris and Murphy (n 122) 35.

Conversely, Hutter had observed that the latter position is not to conclude that socio-legal studies ignore the law in books.¹³⁰ It should be made clear that socio-legal studies tend to express the practical application of the law in relation to prevailing social needs rather than the ordinary wordings of law or books. In relation to the current research, it has been shown that in most cases, courts have given a more creative and expansive interpretation of certain fundamental rights provisions to curb social problems relating to dangerous industrial activities affecting inhabitants, even if it could be argued that legislators never contemplated on the application of such rights to address environmental problems. Also, it is recognised that the lack of public awareness on environmental matters has significantly affected the health and general well-being of inhabitants in pollution prone areas as well as the enforcement of fundamental rights. This discussion, as raised in chapter 4 is showcased to reflect how social problems influence the law-making.

It is worth noting that the current research brings basic principles under the law of torts and human rights law into environmental law. It is shown that these aforementioned areas of law retain principles and practices that relate to the protection of the environment. The current research is socio-legal in nature because of its objective to enforce social regulation within the ambit of environmental pollution. It directs attention to the intervention of the state through law¹³¹ and specifically focuses on the need for the government and judiciary to implement fundamental rights to life, dignity of the person and private and family life with a view to protecting the environment.

Hutter observed that socio-legal scholars are particularly concerned with comprehending the social, political and economic processes that bring law about and shape its form and content as regards enforcement and its daily impact.¹³² This latter feature of the socio-legal study is clearly reflected and deployed in chapter 3 of the research which focuses on some of the numerous challenges encountered by victims of environmental pollution in enforcing their fundamental rights to a safe environment. At the forefront of these hurdles is the economic

¹³⁰

Bridget M Hutter, 'Socio-Legal Perspectives on Environmental Law: An Overview' in Bridget M Hutter (ed), *A Reader in Environmental Law* (OUP 1999) 4.

¹³¹

Hutter (n 130) 4.

¹³²

ibid.

reason, which is explained to influence the disposition of judges in such a manner that dims the effective enforcement of environmental rights due to the benefits that the state derives from activities of the oil and gas industry,¹³³ and this briefly associates the research to the jurisprudential perspective of ‘Law and Economics’, which explains the behaviours of stakeholders in the legal system.¹³⁴ Legislators are seen to inculcate certain defences in legislation under which oil operators would run smoothly with limited environmental liability bottlenecks and judges seem to recognise such moves for the economic benefit of the state.

The research took into consideration the measure of liability relating to fundamental rights enforcement proceedings as regards environmental pollution incidents in three major common law jurisdictions, bearing in mind that every jurisdiction retains its peculiar features and legal background, defined by economic, political and social factor: notwithstanding, issues of human rights are beyond national boundaries and deserves universal approach.¹³⁵ In the current argument for absolute liability relating to environmental pollution, the researcher maintains similar position with The District Court of The Hague in *FA Akpan & Anor v Royal Dutch Shell & Anor*,¹³⁶ with little reservations. In that case, the second plaintiff moved for a declaratory judgment whilst making reference to the *Jonah Gbemre* case in a Dutch Court, that SPDC is liable for affecting Akpan’s (first plaintiff) right to physical integrity due to the contamination of his environment. The District Court of The Hague, in dismissing the request, reasoned inter alia, that in the *Gbemre* case, the Court ruled that SPDC had infringed a human right by its ‘active conduct’ by deliberately flaring gas during a long period. Meanwhile in *Akpan* (case at issue), SPDC cannot be blamed for any active conduct except negligence; noting that there have been no Nigerian ruling in which event of sabotage by

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This is particularly analysed in figure 3.1 of the research.

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Morris and Murphy (n 122) 34.

135

See the Preamble to the Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III).

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District Court of The Hague Case No. C/09/337050/HA ZA 09-1580, 30 January 2013<<https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-shell-oil-spill-ikot-ada-udo>> accessed 12 January 2016.

third parties is considered to be an infringement of a human right.¹³⁷ Theoretically, the author maintains that there is reasonable argument for absolute liability under fundamental rights enforcement against environmental polluters as shown in chapter 6 of the research,¹³⁸ but in practical terms, the Nigerian courts will take into consideration acts of third parties in determining liability. Notwithstanding, it is observed throughout the research that there is a stricter liability under fundamental rights to a clean environment than could be witnessed under the strict liability rule in *Rylands v Fletcher*.

Whilst the research is centrally focused in the Nigerian jurisdiction, related aspects of the law in England and Wales as well as the Indian jurisdictions were given credence, noting that all three jurisdictions retain a common law background and possess several similarities in their legal systems; Nigeria and India, being former British colonies. This explains the utilisation of the Comparative Legal Analysis Methodology. The key purpose of utilising this approach in the instant research is to look outside the Nigerian jurisdiction into almost similar legal jurisdictions to see how victims of environmental pollution are treated within the framework of fundamental rights enforcement. This opens the mind of the researcher to new ways or best practices in handling environmental pollution from a human right angle.¹³⁹ Also, principles of international law regarding environmental liability, as a whole, are considered. This has been useful in the series of comparative analyses and arguments made, since the national jurisdictions considered in the research are member states of some of the conventions and treaties considered.

The researcher has explored the issues and challenges raised in the current research through literature search. Both primary and secondary sources are utilised. The key primary sources are case law, statutes, regulations, treaties, government policy documents and websites of various institutions. The researcher visited the Federal High Court in Edo State, Nigeria (Benin Judicial Division) to apply for and verify the records of the landmark case of *Jonah*

¹³⁷

ibid 4.56.

¹³⁸

See figures 6.4.1 on 'The Technical Meaning of the Term 'Absolute' and its Usage within the Framework of Fundamental Rights Violations' and 6.5 on 'Transformation of Negligence, Nuisance and Strict Liability to Absolute Liability'.

¹³⁹

Morris and Murphy (n 122) 37.

Gbemre relied upon as the case study in the current research, being the first of its kind and due to various reports surrounding the judgment, particularly on allegations that the case file is missing and the judge was sacked in view of the significance and underlying political and economic impact of the judgment. On the secondary sources, there is heavy reliance on opinions of legal experts, books and published articles, including newspapers.

According to Chatterjee, ‘the purpose of a literature search is not to look for new ideas but to find out what has already been explored in a related area and under what conditions’.¹⁴⁰ It is observed that the relationship between environmental pollution and fundamental rights violation in Nigeria has not been given much attention that it deserves by academics, bearing in mind the increasing reports of incidents of environmental pollution which are clearly seen to affect well-known constitutional rights of victims. It is equally noted that no substantive information exists on the critical appraisal of the measure of liability that could apply to actions of fundamental rights enforcement within the perspective of environmental pollution in comparison with existing principles of liability in common law torts and statutory liability relating to environmental pollution in Nigeria. The shortage or modicum of academic information in the present area of study is equally explained on the failure of the Nigerian Courts to give adequate judgments linking environmental pollution incidents to fundamental rights violation. It is trite that by identifying the gaps in the existing literature, the researcher would be best placed to make original contribution to the field of study.¹⁴¹ Having regard to a series of legal analyses in succeeding chapters, the argument for an absolute liability for fundamental rights violation within the sphere of environmental pollution incidents was vividly showcased, particularly in chapter 6 of the research.

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Chatterjee (n 120) 17.

141

Morris and Murphy (n 122) 45.

CHAPTER 1

REFLECTING ON THE DOCTRINES OF STRICT AND ABSOLUTE LIABILITIES

1.1 Introduction

The doctrines of strict and absolute liabilities are basic principles of law that can be utilised in determining the liability of environmental polluters. The terms ‘strict’ and ‘absolute’ appear to have a synonymous usage in ordinary legal interpretations and their meanings seem not to be ambiguous. For example, ‘strict liability; absolute liability; liability without fault’ are seen as synonymous phrases by Garner to mean ‘liability that does not depend upon actual negligence or intent to harm,’¹ but the aforementioned terms are complex when brought before legal minds for interpretations, particularly in the context of issues relating to the determination of environmental liability. The jurisdiction in which the doctrines of strict and absolute liabilities are used has significant legal effect on the context and interpretation given to them. Notwithstanding, it would be a legal misnomer to use both ‘strict’ and ‘absolute’ liabilities as interchangeable terms. Waite had maintained that in absolute liability, ‘it is unnecessary to prove either causation or fault on the part of the defendant,’ while strict liability ‘requires proof of causation but not fault’.² Contrary to the connotation of ‘no-fault’ liability given to the strict liability rule, Reid maintained that ‘the assumption that strict liability is “stricter” than fault based liability is implicit,’³ and that such assumption should not go unchallenged owing to the fact that ‘codified provisions imposing strict liability often permit a range of defences’.⁴ These discrepancies in the meanings of the aforesaid terms, makes the current reflection a worthwhile task.

1

Bryan A Garner, *A Dictionary of Modern Legal Usage* (2nd OUP 1995) 836.

2

Andrew Waite, ‘The quest for environmental law equilibrium’ (2005) 7 ELR 34, 39.

3

Elsbeth Reid, ‘Liability for dangerous activities: a comparative analysis’ (1999) 48 ICLQ 731, 736

4

ibid.

This chapter briefly reflects on the doctrines of strict and absolute liabilities by considering their legal meanings and usage in English law, as English law forms a substantial part of the Nigerian legal system.⁵ This is done by taking into cognisance case law and opinions of various legal experts, but more on a practical perspective rather than theoretical. The essence of delving into these legal terms at this initial stage is to expunge the likelihood of using these terms interchangeably and possibly draw a clear line in-between the terms. But more importantly, this is done to respond, in part, to one of the key hypotheses in this research ‘whether the current techniques of measuring liability, particularly under tort law are clear in Nigeria’.

Also, the current ‘reflection’ is aimed at laying a proper foundation and a skeletal preview of what is intended to be analysed in the later part of this research, thereby avoiding the use of strange legal concepts and principles of law. The analysis contained in this chapter substantially underpins and explains the basis for the argument for an absolute liability against oil transnational corporations (TNCs) in chapter 6, which affirms that on a scale of zero to ten (0-10), where 5 represents ‘strict liability’ and 10 represents ‘absolute liability’, environmental liability under fundamental rights enforcement, should be pinned under 9, with limited space left for illegal activities of ‘third parties’ where pollution is shown to be manifestly unavoidable in events relating to illegal oil bunkering and acts of sabotage by vandals.⁶ But even with this standpoint, it is argued that liability ought to be absolute in that such activities of ‘third parties’ are foreseeable, and if TNCs are proactive and diligent enough in curbing pollution, they would forestall such acts of third parties.⁷

5

Madza Nannuguhan, ‘The Judicial System of Nigeria’ (1987) 7 *Army Lawyer* 20, 21. See also Lee J McConnell, ‘Establishing liability for multinational companies in parent/subsidiary relationships’ (2014) 16 *ELR* 50, 53.

6

The justification for this proposition is argued in chapter 6 of this research, particularly in figures 6.4, 6.4.1, 6.5 as well as 6.6 with regard to the Indian jurisdiction. This proposition cannot be applicable to the enforcement of Conventions rights in the UK owing to the *Margin of Appreciation* principle discussed in figure 2.3.

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See figure 6.4.1 on the meaning of ‘absolute’ and its usage within the framework of fundamental rights violations.

Furthermore, the current chapter highlights the key legal differences between the doctrine of strict liability and other related terms such as nuisance and negligence.⁸ This is done as the aforementioned terms share certain similar ingredients with the strict liability rule. It should be borne in mind that the current research is focused on determining whether the doctrine of absolute liability may be applied to the issue of the protection of the environment when the protection has been disregarded by TNCs within the ambit of fundamental rights enforcement. In view of this, tortious liability principles discussed in the current chapter are not given too much detail since it is a preliminary discussion for guidance and cross referencing on the critical analysis of the supposed measure of liability that would be deployed in violation of environmental rights in Nigeria.

The rationale for relying on English cases in the current chapter is informed on the basis that the key tortious liability principles discussed herein have their origins in the English legal system and hitherto remain persuasive in Nigerian courts,⁹ and in most court proceedings on environmental liability in Nigeria, English common law principles in the torts of nuisance, negligence and strict liability form the benchmark for determining liability.¹⁰

1.2 **The Common Law Doctrine of Strict Liability: A Brief Background**

The common law doctrine of strict liability which is popularly linked with the much celebrated case of *Rylands v Fletcher*¹¹ was known ab-initio by legal writers and the Courts as the law of nuisance.¹² The doctrine of strict liability emerged in the 19th century as a result of immense growth in economic activities, resulting from the commercial and industrial

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These terms are briefly discussed under figure 1.4

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Lee J McConnell, 'Establishing liability for multinational companies in parent/subsidiary relationships' (2014) 16 ELR 50, 53.

¹⁰

The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC) [5].

¹¹

[1861-73] All ER Rep 1 (HL).

¹²

Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 AC 264 (HL), 298-300 (Lord Goff).

revolution. Both public and private investors were engaged in industrial activities on their lands, which in some instances caused discomfort and often damage to neighbouring land users. The strict liability rule was therefore established by the courts to address such damages and discomforts, the courts deemed it justifiable that if an individual uses his land to make profits and in the course of such use, caused damage to an adjoining user, the user of the land should be 'strictly liable' for the consequential damages caused to his neighbours without any need for his neighbours to establish fault. This is the focal point of the doctrine of strict liability, it is otherwise known as 'liability without fault', since the need to prove any fault on the part of the defendant is not required, so long as the claimant suffered loss. However, Nolan had observed that opinions differ as to the intentions of those who created this rule.¹³

In the case of *Cambridge Water Co Ltd v Eastern Counties Leather Plc*¹⁴ the doctrine of strict liability was described as a sub-species of the law of private nuisance. A succession of academics have maintained this view.¹⁵ Conversely, Lord Porter in *Read v J Lyons & Co Ltd*,¹⁶ has assumed liability in the law of tort to principles of negligence. This was evident when he said that:

Normally at the present time in an action of tort for personal injuries if there is no negligence there is no liability. This rule, however, the appellant contends that there are certain exceptions, one of the best known of which is to be found under the principle laid down in *Rylands v Fletcher*.¹⁷

However, there are certain features relating to the doctrine of strict liability as established in *Rylands v Fletcher* which makes it unique and different from both the laws of private

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Donal Nolan, 'The distinctiveness of *Rylands v Fletcher*' (2005) 121 LQR 421, 422.

¹⁴

Cambridge Water Co Ltd (n 12).

¹⁵

Nolan (n 13)

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[1947] AC 156 (HL) 175.

¹⁷

ibid 175.

nuisance and negligence, and therefore deserves to be given consideration.¹⁸ Also, the torts of nuisance and negligence, in some aspects, share common features in law. All these, are adequately addressed in this chapter.

1.3 **The Nature and Scope of the Doctrine of Strict Liability**

The strict liability rule, as observed, is not straightforward, as the courts and legal experts have taken different views in relation to certain aspects of the rule.¹⁹ It is on this note that consideration is given to the original facts of the case and the position of the courts in *Rylands v Fletcher* and other subsequent cases in order to decipher the scope of the doctrine. The strict liability rule and other related terms are analysed with a view to comparing the measure of liability obtainable in them with the measure of liability obtainable in environmental rights enforcement in Nigeria, England and Wales, as well as the Indian jurisdictions. It is observed that the standard of liability in environmental rights enforcement in England and Wales is synonymous to that obtainable in the common law tort principles of nuisance and negligence as shown in the English case of *Marcic v Thames Water Utilities Ltd.*²⁰ Meanwhile, environmental rights issues are treated differently in Nigeria and India with a stricter standard of liability than is obtainable in the above mentioned common law torts.²¹

Whilst describing the dynamic nature of the strict liability rule, Nolan stated that, ‘the waxing and waning of the rule’s popularity has been accompanied by shifting perceptions as to the intentions of those who created it’.²² In the same vein, Waite submitted that:

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The differences between strict liability and other related torts have been fully discussed in the body of this work, particularly in figure 1.4.

¹⁹

Nonal (n 13)

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[2003] UKHL 66, [2004] 2 AC 42. This case is discussed under figure 2.3 in chapter 2 of the thesis. See also figure 6.4.1 on the measure of liability obtainable in breach of Convention rights relating to a safe environment.

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See figure 6.6 on ‘The Measure of liability in Fundamental Rights Violation Claims: A Brief Comparative Analysis between the Nigerian and Indian Jurisdictions’.

²²

Nonal (n 13) 421.

In 1860, as Rylands contemplated the new reservoir constructed to supply water to Ainsworth Mill, he did not know that he had triggered a chain of events which was to have a profound, if chaotic, effect on the development of the common law of tort.²³

It is against this background that attention is given to the ‘chain of events’ embodied in the strict liability rule as established in the *Rylands* case. In *Rylands v Fletcher*,²⁴ the defendants who lived near Ainsworth in Lancashire had a water mill which they wanted to improve. They obtained permission from relevant authorities in order to construct a reservoir, and they retained expert engineers to carry out the construction. In the course of the construction of the reservoir the engineers discovered some disused mine shafts and failed to seal them properly. When the reservoir was filled with water, the water flowed through the shafts and flooded the plaintiff’s coal mine, causing damage.²⁵ The case was first taken to the Court of Exchequer which found in favour of the defendants. The plaintiff consequently took the case to the Court of Exchequer Chamber via a writ of error and obtained judgement. The defendants further appealed to the House of Lords and the case was dismissed.

The decision of the Court of Exchequer Chamber happened to expose the celebrated doctrine of strict liability. Whilst delivering the Judgment, Blackburn J said:

...We think that the rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.²⁶

The above meaning of strict liability as enunciated by Blackburn J contains certain elements which this research has given considerable attention to, but this has been done from the perspective of oil and gas pollution activities, as the rule has equally found its way into the

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Andrew J Waite, ‘Deconstructing the Rule in *Rylands v Fletcher*’ (2006) 18 JEL 423.

²⁴

Rylands v Fletcher (n 11).

²⁵

Tony Weir, *A CaseBook on Tort* (10th edn, Sweet & Maxwell 2004) 453.

²⁶

Rylands (n 11).

Nigerian legal system as shown in numerous cases dealing with environmental pollution,²⁷ and more recently as enunciated by Mr Akenhead in *The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd*,²⁸ just as it is common knowledge that ‘Received English Law’ is a major source of Nigerian law.²⁹

Lord Cairns added a further requirement to that of Blackburn J in the same case of *Rylands v Fletcher* which the claimant must prove to succeed. The additional requirement was that the ‘thing’ brought to the land must be a ‘non-natural’ use of the land.’³⁰

To fully appreciate the meaning of the strict liability rule as stated by Blackburn J in *Rylands v Fletcher*, it is necessary to consider the basic elements of the tort, briefly. There are four basic elements which are deducible both from Blackburn J. and Lord Cairns’s positions as seen above in order for the claimant to succeed in any claim under strict liability. These elements are now discussed.

1.3.1 The Bringing of the Thing to the Land

In order for a claimant to succeed in a case brought under the rule in *Rylands v Fletcher*, the claimant must show that the ‘thing’ which has caused damage was brought to the land by the defendant(s). In essence, if the thing which has caused damage to the claimant is already naturally present on the land then the defendant cannot be held liable under the rule of strict liability as established in *Rylands v Fletcher*.³¹ This position has been affirmed by the English courts in a plethora of cases. One of such cases is the case of *Ellison v The Ministry of Defence*³² where the plaintiffs claimed damages for damage caused to their land by flood

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Some of the landmark Nigerian cases bordering on the strict liability rule are discussed in figure 1.7.

²⁸

[2014] EWHC 1973 (TCC) [5].

²⁹

The Bodo Community case (n 28) [14].

³⁰

Chris Turner, *Tort Law* (2nd edn, Hodder Arnold 2007) 145. See also *Rylands v Fletcher* (n 11) [11] (Lord Cairns).

³¹

Turner, *Tort Law* (n 30).

³²

which was adjacent to Greenham Common airfield which was occupied by the defendants. The Court dismissed the claimant's claim on the grounds that the accumulated water was a natural occurrence. This decision could have been different if the 'accumulated water' was brought by the defendants. Another interesting fact is that the person who brings the thing on to the land does not necessarily have to be the owner of the land, someone who is granted a licence can equally fall within this principle,³³ and this extension of the rule of strict liability covers cases of oil companies who are mostly under the licence from government authorities.

The crux in this aspect of the doctrine of strict liability is that the defendant must have brought something on the land which was not naturally part of the land for 'its own purposes'. In the case of *Dunne v North Western Gas Board*³⁴ the defendants were exonerated from any liability in the escape of gas leading to explosion in highway which caused injury to the plaintiff since their services to supply gas to customers were not for the 'defendant's purposes' but for the public.³⁵ An important question could be raised regarding whether activities of oil operators are for the interest of the public in this regard? This can be answered in two perspectives. It can be said that oil companies are involved in private; profit-making businesses, and as such could be considered to be engaged in the 'defendant's purposes' and therefore not for public interest. This latter position can be countered on the grounds that proceeds of sales from oil and gas are utilised for the economic well-being of the state, and such oil mining activities can be considered as a pursuit for public interest. That, notwithstanding, could it be said that a defendant would escape liability only by showing that its activities were for public benefit?

It is observed that the position of the Court of Appeal in the *Dunne* case above is trite in law but needs to be demystified in that the plaintiff's claim centred on the torts of negligence, nuisance and the strict liability rule, and given that the defendants' undertakings were authorised by statute and defendants were found not to be negligent in injuries caused to the

[1996] 81 BLR 101 (QB).

³³

Turner, *Tort Law* (n 28) 147.

³⁴

[1964] 2 QB (CA) 806.

³⁵

ibid 831[*Seller LJ*].

plaintiff, liability could not be established.³⁶ It is submitted, having regard to the entire verdict of the Court in *Dunne* that the defendants were exonerated from liability basically on two grounds-(a) that there was no negligence on the part of the defendants³⁷ and (b) that the defendants' activities were authorised under statute and therefore, they were not collecting and distributing gas for their 'own purposes', but for purposes authorised by the State³⁸ (which incidentally is for public good as shown in the facts of the case). In essence, liability would emanate where the defendants were found negligent, even if their activities are permitted by statute and are of a kind which is beneficial to the public. One may state that there is no case law or statutory provision to the effect that a defence of 'public interest' does exist or sustains a defendant without reference to the defence of statutory authority under the strict liability rule.

In the light of the above, it would be probable to conclude that since oil and gas activities are permitted by statute and proceeds from oil and gas sales are beneficial to the state, liability would not hold in incidents of oil and gas pollution, except it is shown that there is a case of negligence on the part of oil operators.³⁹ This is distinguishable from the *Rylands* case where defendants' activities were carried out by an independent contractor solely acting for private profits and without statutory obligation, even though the activities in that case were permitted by law (that is, not illegally executed).

1.3.2 The Thing Likely to do Mischief if it Escapes

It is worth mentioning that the tort of strict liability is basically concerned with the 'dangerous' activities of the defendant.⁴⁰ It is to be wondered why the doctrine of strict

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Dunne (n 34) 836 - 837.

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Dunne (n 34) 835.

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ibid.

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See figures 1.5.1 and 1.7 on the defence of statutory authority and the applicability of the strict liability rule in Nigeria respectively.

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Richard Pike, 'Application of the Rule in *Rylands v Fletcher*' (2012) Construction Newsletter Nov/Dec 6-7.

liability is applicable to a defendant's conduct which was permitted by law; that is, if 'the bringing to the land' of the thing which has caused damage is allowed by the law of the place where the damage is caused then why would a defendant be strictly liable for the aftermath effects of such a 'thing'? The response to this question is the foundation of the 'foreseeability test'. The foreseeability test in a claim brought under the rule of *Rylands v Fletcher* requires that the court must decipher from the available evidence and the facts of the case that the defendant had knowledge, or must have reasonably foreseen that the 'thing' if it escapes would cause damage,⁴¹ but remains negligent in the circumstance.

1.3.2.1 What is a Dangerous Thing?

An important question to address is: what is a dangerous thing? The phrase 'dangerous thing' in the context of strict liability doctrine and as it relates to environmental pollution can be vague and ambiguous in the jurisprudence of tortious liability. In determining what amounts to a dangerous thing, Rogers pointed out that the crux is to be able to ascertain whether the 'thing' at its escape would be likely to cause damage.⁴² It follows that, the scale of the risk presented by the defendant⁴³ must be taken into consideration to determine liability. Whilst drawing an instance, Rogers submitted that 'A box of matches or a glass of water do not really fall within the rule, a million boxes of matches in a store or a reservoir may do so.'⁴⁴ What should be bore in mind is that the likelihood of the thing to cause damage must not be interpreted in isolation, it must be interpreted in line with the requirement of 'non-natural use' of land.⁴⁵ Nevertheless, the dangerousness of the 'thing' which has caused damage should be determined by a reliable body of scientific knowledge at the time of the escape.⁴⁶ It

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Richard Barham, 'Environmental: Rylands v Fletcher – foreseeability of harm' (1994) 5 ICCLR C42.

⁴²

WVH Rogers, *Winfield and Jolowicz on Tort* (18th edn, Thomson Reuters 2010) 772.

⁴³

Winfield and Jolowicz on Tort (n 42) 771.

⁴⁴

ibid.

⁴⁵

See figure 1.3.3 on the meaning of 'non-natural user'.

⁴⁶

is submitted that what is dangerous could be informed based on the circumstances surrounding the case in issue, and possibly the jurisdiction. The entire burden falls on the court to determine what is dangerous, which could be obtained with regards to contemporary considerable body of scientific knowledge.

A close analysis of Blackburn J's judgment as enumerated by Rosalind English,⁴⁷ reveals that the 'thing' which is brought to the land may be harmless whilst it remains within the defendant's vicinity, but such harmless 'thing' can fall within the rule if it escapes and causes damage to the claimant. This therefore implies that the thing itself does not have to be 'dangerous' in its original form, for the 'dangerousness' of the thing will be determined by the negative impacts which it will cause, bearing in mind the defendant's knowledge on the possibility of such a 'thing' to cause damage on its escape. Considerations on the defendant's state of mind, therefore plays an important role in establishing liability in cases of strict liability under *Rylands v Fletcher*.⁴⁸ This was complemented when Blackburn J said:

... It seems but reasonable and just that the neighbour, who brought something on his own property which was not naturally there, harmless to others so long as it is confined to his property, but which he knows to be mischievous if it gets on to his neighbour's shall be obliged to make good the damage which ensues...⁴⁹

The term 'reasonable foreseeability' depicts that the defendant will not be liable for damages which he could not have reasonably foreseen.⁵⁰ The dangerous things which are likely to cause mischief in cases of strict liability have been mentioned to include but not limited to;

Winfield and Jolowicz on Tort (n 42).

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Rosalind English, 'No fault liability; the Cambridge Water case' (1993) JPEL 409-416.

⁴⁸

English (n 47).

⁴⁹

Rylands (n 11) 6.

⁵⁰

Richard Shields, 'Liability without fault, *Rylands v Fletcher* Revitalised' (1999) 2 Trinity CL Rev 124, 127.

fire, gas, blasting and munitions, electricity, noxious fumes, poisonous vegetation, a flag pole, vibrations, and oil and petrol.⁵¹

It is useful to come across cases where pollution caused by gas and petrol were interpreted by the courts as amounting to ‘dangerous things’ which fall within the scope of the strict liability rule, since this work is concerned with the liability of polluters. In the case of *Batcheller v Tunbridge Wells Gas Co*,⁵² the defendants were the owners of a gas pipeline laid under a high-way which was very close to a pipe supplying waters to the plaintiff’s houses. The plaintiffs were entitled to a declaration by the court preventing further contamination or pollution caused by the gas pipes of the defendants to the plaintiff’s water supply. In another case of *Colour Quest Ltd v Total Downstream UK plc*,⁵³ proceedings arose as a result of a number of explosions caused by a large fuel tank used by a number of oil companies. The explosions caused damages to the claimants’ properties. In the cause of the trial, it was agreed that all damages sustained by the claimants were all a ‘foreseeable consequence’ of the explosion. There is a growing body of judicial cases to the fact that oil and gas are dangerous things, and there is no doubt that courts have taken judicial notice of this fact. Furthermore, the Health and Safety Executive in the UK recognises gas and related harmful chemicals as oil to be substances hazardous to health.⁵⁴

1.3.3 A Non-Natural Use of the Land

Another important element which the claimant is expected to establish in order to succeed in a claim under the rule in *Rylands* is to establish that the ‘thing’ which has caused damage to the claimant is a ‘non-natural user’ of the land, that is, the thing is not naturally part of the defendants’ land. However, there are difficulties in establishing what actually amounts to a

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Winfield and Jolowicz on Tort (n 42) 771.

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[1901] 84 LT 765 (Ch D).

⁵³

[2009] EWHC 823 (Com Ct), [2009] All ER (D) 311.

⁵⁴

Health and Safety Executive, ‘What is a substance hazardous to health?’ <<http://www.hse.gov.uk/coshh/basics/substance.htm>> accessed 22 November 2016.

‘non-natural use of land’.⁵⁵ Shields defined ‘natural’ to mean anything which exists by nature and is not artificial, and that in a secondary sense it can also mean ‘that which is ordinary and usual, even though it may be artificial’.⁵⁶ From Shields’ definition, it is obvious that what amounts to a ‘non-natural’ use of land will depend on the circumstances of the case before the courts since the term is not conclusive.⁵⁷

In the case of *Read v J Lyons & co Ltd*,⁵⁸ Lord Porter briefly construed the meaning of the concept of non-natural use when he said ‘...to bring the thing to the position in which it is found is to make a non-natural use of that place’.⁵⁹ It is apparent that Lord Porter was not comfortable with the aforesaid meaning given to the concept of non-natural use of land, and whilst acknowledging the varied opinions of Judges, he added:

For the present I need only say that each seems to be a question of fact subject to a ruling of the Judge whether...the particular use can be non-natural, and in deciding this question I think that all the circumstances of the time and place and practice of mankind must be taken into consideration so that what might be regarded as...non-natural may vary according to those circumstances.⁶⁰

One important determinant of the term ‘non-natural use’ which has been relied upon by writers on strict liability was provided in the case of *Rickards v Lothian*⁶¹ by Lord Moulton

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Shields (n 48) 128.

⁵⁶

ibid.

⁵⁷

See Lord Porter’s view in *Read v Lyons* (n 55) where it was maintained that what is ‘non-natural’ is a question of fact subject to the ruling of a judge with contemplation of the time, place and practice of the jurisdiction in question.

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[1947] AC 156 (HL).

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Read (n 58) 176.

⁶⁰

Read (n 58) 176 (Lord Porter).

⁶¹

[1913] AC 263 (PC) 280 (Lord Moulton).

who said that for the rule to apply 'it must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such use as is proper for the general benefit of the community'.

In the case of *Cambridge Water Co Ltd v Eastern Counties Leather Plc*,⁶² the issue of non-natural user was raised where the question of spillages of industrial effluent which affected ground water were held not to be 'non-natural', owing to the fact that chemical spillages were regarded as normal in the particular industry at the time. Ordinarily, through a literal interpretation of the meaning of 'non-natural', or from the above definitions, one could argue that the spills of industrial effluents which affected ground water in the *Cambridge Water* case were a non-natural use of land. But this variation of judges in the course of interpreting what amounts to a non-natural use of land is in line with Lord Porter's position in the *Read* case⁶³ regarding the need to take into consideration 'all the circumstances of the time and place and practice of mankind'. It is submitted that this dynamic nature of the meaning of 'non-natural' is more largely dependent on the circumstances of the case at issue rather than a rigid interpretation of the law.

From the foregoing, it is clear that for the rule to apply, the defendant must have brought the 'dangerous thing' for his special use, and on this note, even if the thing brought is dangerous it can still be considered as a 'natural use' of the land insofar as it serves the community or it is for the public use. In essence, liability will not be 'strict' if the thing that has caused damage is recognised as being so desirable that it will almost become obligatory for the community to benefit from such 'thing'.⁶⁴ However, this position cannot be conclusive.

1.3.4 The Thing Must Actually Escape

One final element to establish in strict liability under *Rylands v Fletcher* is that the thing which has caused damage must escape from the defendant's land to that of the claimant. This element is necessary because accidents that will befall a claimant who is in the defendant's

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[1994] 2 AC 264 (HL).

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Read v Lyons (n 58).

⁶⁴

Rickards v Lothian (n 61).

land are totally excluded from the rule.⁶⁵ This requirement appears to be direct and conclusive but there is the possibility of the courts exercising discretion based on the particular circumstances of the case. However, a benchmark for enforcing this requirement has been set in the case of *Read v J Lyons & Co Ltd*⁶⁶ when Viscount Simon said: ‘Escape... means escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control’. In this regard, once there is an escape, it does not matter if the claimant does not share a common boundary with the defendant, what seems relevant to establish liability is that the claimant has suffered damage as a natural consequence of the escape.

1.3.4.1 Contributory or Joint Liability

One significant issue in environmental liability claims is: who can be sued in environmental pollution incidents? It can be noted that in cases of oil spillage and gas flaring, liability can be ‘contributory’ or ‘jointly shared’ between the state and the oil operators. That is, a transnational corporation, can, by way of a defence in a strict liability claim allege that the ‘escape’ of oil or gas was as a result, partly of the negligence or the foreseeable act of the state government. Blackburn J had observed in *Rylands* that the strict liability principle applies to ‘the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief.’⁶⁷ It appears to be settled that a licensee who had accumulated the dangerous thing on the land of another would be liable for any damage arising from such accumulation. In *Westhoughton Coal and Cannel Company Ltd v Wigan Coal Corporation Ltd*,⁶⁸ the test for liability was anchored on ‘control’. That is liability will accrue to the person in control of the land. In the latter case, the Court of Appeal exonerated the defendant from liability since he had ceased to possess or control the right in land sixteen years ago before the water flowing through a tunnel on the said land flooded the

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Shields (n 50) 128.

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Read v Lyons (n 58) 168 (Viscount Simon).

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Rylands (n 11).

⁶⁸

[1939] Ch 800 (CA).

plaintiffs mine.⁶⁹ In the same vein, it can be seen that in the case of *Rylands v Fletcher*, the defendant only had a licence from the relevant authority for the construction of the reservoir.⁷⁰ It is worth noting that the proper party to sue would basically depend on the prevailing circumstance and it could not be a settled matter in law. But for the State to escape liability, it would be clear that it acted reasonably without negligence as a regulator or policy maker. This latter position was affirmed by the then House of Lords in *Marcic v Thames Water Utilities Ltd.*⁷¹

In Nigeria, the Nigerian National Petroleum Corporation (NNPC) operates in joint partnership with the major oil companies and this partnership is guided by production sharing contracts.⁷² Being that liability is circumstantial and the oil companies are operating under a concession system as independent legal entities, it follows that the relevant government will escape liability, if it can be inferred from available evidence that the State did take reasonable steps as the regulator to truncate environmental damage or either enjoined oil operators to fulfil their statutory obligations or contractually passed on the relevant obligations as part of the concession agreement. The courts, *suo moto*, or on the application of a party can order for joinder of parties in a lawsuit where it is obvious that a right to a relief sought by the plaintiff can be established against such party or where a party is the alter ego of any injury suffered or their action is ancillary or incidental to the cause of action and was a proper party even though there was no cause of action against such party.⁷³ It is noteworthy that no proceedings

⁶⁹

ibid 810.

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See Winfield and Jolowicz on Tort (n 42) 773 for further analysis on proper parties under the strict liability rule.

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[2003] UKHL 66, [2004] 2 AC 42, 59-60 [40] – [43] (Lord Nicholls).

⁷²

Nigerian National Petroleum Corporation, 'Joint Venture Activities' <<http://nnpcgroup.com/NNPCBusiness/UpstreamVentures/JointVentureActivities.aspx>> accessed 15 June 2014.

⁷³

See Ord 9, r 5 of the Federal High Court Rules 2009 (Nigeria). See also the case of *TSB Private Bank International SA v Chabra and another* [1992] 2 All ER 245 (Ch D) (Mummery J) on circumstances where parties could be joined due to their nexus with the subject matter of dispute in England and Wales.

can be defeated by reason of misjoinder or non-joinder of parties.⁷⁴ Furthermore, the Nigerian Oil Pipelines Act⁷⁵ is instructive on issues of responsibility on oil pollution damage. Section 11(5)(a) of the Oil Pipelines Act provides that:

The holder of a licence shall pay compensation to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the right conferred by the licence, for any such injurious affection not other-wise made good.⁷⁶

It is pertinent to note that the court retains substantial discretion, after hearing from the parties or even on its own to order for joinder of a necessary party, provided the presence of such party is necessary to completely determine all issues in the proceeding; and joinder of parties can be made at any stage of the proceeding.⁷⁷ It follows that all necessary parties must be joined. Again, in most cases where there is a contractual nexus or a correlation in the nature of harm suffered, the claimants traditionally join the government and its agencies alongside the oil company directly involved in environmental pollution claims, provided such government agents would be bound by the outcome of the lawsuit. The Nigerian National Petroleum Corporation in most cases is included as a necessary party owing to its stakes in oil companies operating in the country as well as its regulatory role and as a primary stakeholder in the Nigerian petroleum contract system.⁷⁸ In the same vein, the Attorney General of the Federation is usually a party to proceeding due to its executive role in enforcing court

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Ord 9, r 14(1) Federal High Court Rules 2009.

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Oil Pipelines Act Cap O7 LFN 2004.

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Oil Pipelines Act (n 75), s 11(5)(a).

⁷⁷

See *AG Federation v AG Abia State & 35 Ors* (2001) NWLR (Part 725) 689 at 753. See also *Panalpina World Transport (Nig) Ltd v JB Olandeen International & 4 ors* (2010) 19 NWLR (Part 1226) 1 at 4. The aforementioned are all decisions of the Supreme Court.

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Ejims Okechukwu, 'Impact of Nigerian International Petroleum Contracts on Environmental and Human Rights of Indigenous Communities' (2013) 21 AJICL 345, 350.

judgments, and this does not necessarily mean that the defendants will be interested in all the reliefs prayed for by the plaintiffs.⁷⁹

There exists a plethora of judicial cases suggesting joint liability between government and oil operators. In the Nigerian case of *Jonah Gbemre v SPDC Nigeria Ltd and others*,⁸⁰ in a matter of fundamental rights enforcement against the continuous gas flaring in the course of oil extraction by the first defendant (SPDC), the Nigerian National Petroleum Corporation and the Attorney General of the Federation were included as proper parties, and the court made direct judicial pronouncements affecting the aforementioned parties. This is in line with the principle of contributory or joint liability as mentioned in the current research.

Having considered the basic elements which are necessary to establish a case of strict liability in *Rylands v Fletcher*, it is important to briefly look at other related concepts in establishing liability in cases of oil and gas pollution. Although, the majority of precedents which are being referred to in establishing the elements of strict liability are not directly connected with cases of oil and gas pollution, they are mostly common law precedent. However, the circumstances and the necessary legal elements which the courts will require to establish 'strict liability' in oil and gas pollution are the same. In essence, the only major difference which can arise between the facts of *Rylands v Fletcher* and other cases of oil and gas pollution will be the 'thing which escapes', whilst in the case of *Rylands* it is 'water', most of the subsequent cases analysed in the research are on 'oil and gas'.

1.4 Other Related Concepts in Determining the Liability of the Defendant

It is important to note that there are other related common law concepts which contain basic ingredients as those found in the case of *Rylands v Fletcher* with certain exceptions, and if not clearly enunciated, one might take them for the same as 'strict liability' cases. It has been noted by Gerhart that strict liability as a doctrinal category of accident law is dying, that in fact the doctrine is on its death bed.⁸¹ This submission would not be unconnected with the perceived generic application of the four basic elements discussed above as criteria for

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See Ord 9, r 7(1) of the Federal High Court Rules 2009 (Nigeria).

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[2005] AHRLR 151.

⁸¹

Peter M Gerhart, 'The Death of Strict Liability' (2008) 56 BLR 245, 246.

bringing a claim under strict liability, more particularly the requirement of ‘foreseeability of harm’ which has been adjudged as a similar requirement in related torts. On the other hand, Amirthalingam had observed that the demise of *Rylands* (strict liability rule) will create a lacuna in the law,⁸² and this lacuna will be more conspicuous on the social reasons for the establishment of the doctrine. In *Transco plc v Stockport Metropolitan Borough Council*,⁸³ reasoning was proposed that a possible justification for retaining *Rylands*’s case was on social grounds. In essence, the background to the case of *Rylands* was to calm the public anxiety about the safety of reservoirs, and in general terms, the principle of strict liability can be said to be governing a category of exceptional or unusual risks,⁸⁴ and in the *Cambridge water Case*⁸⁵ the doctrine was uniquely classified to cover ultra-hazardous activities by the defendant. This implies that the position of the House of Lords in the *Transco* case that the doctrine of strict liability was basically on social grounds could be countered. Having regard to the usefulness of the doctrine in environmental protection, it is submitted that the doctrine of strict liability serves both economic and environmental interest as well.

Alternatively, supposing Gerhart’s view is to be given credence, that is, ‘that the doctrine of strict liability is on its death bed’,⁸⁶ then, the question to pose is: ‘what aspects of the law can comfortably act as the heirs of the strict liability doctrine at its death?’ In response to this question, it will be necessary to briefly consider the alternative branches of common law that could replace strict liability under *Rylands v Fletcher*.

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Kumaralingam Amirthalingam, ‘Rylands Lives’ (2004) 63 CLJ 274-276, 274. See also Brian Simpson, ‘Legal Liability for Bursting Reservoirs: The Historical Context of “Rylands v Fletcher”’ (1984) 13 JLS 209.

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[2003] UKHL 61, [2003] All ER (D) 255 [28] (Lord Hoffman).

84

Winfield and Jolowicz (n 42) 765.

85

Cambridge Waters (n 62).

86

Amirthalingam (n 82).

1.4.1 Nuisance

If the doctrine of strict liability is to be expunged automatically, it will possibly be replaced with the common law of nuisance. This is based on the assertion that the rule of strict liability as established in *Rylands v Fletcher* has its roots in the law of nuisance.⁸⁷ Nuisance is basically concerned with the protection of the environment; the law protects the claimant from anything that will affect the comfort or convenience of the claimants' land.⁸⁸

In the case of *Cambridge Water Co Ltd v Eastern Counties Leather Plc*,⁸⁹ the defendant maintained a tannery which used a chemical solvent in its tanning process. In the course of the process, there were spillages of small amounts of solvent which reached the strata from which the claimants extracted water for domestic use via a borehole. The claimants brought an action against the defendants claiming damages in negligence, nuisance and under *Rylands v Fletcher* for the contamination of their water. The Court of first instance dismissed the claim on the grounds that the defendants could not have foreseen that the spillages of chemicals would enter the claimants' water and the case brought under *Rylands v Fletcher* failed on the ground that the use of the solvent by the defendant amounted to the natural use of land. The claimants appealed and the Court of Appeal held that the defendants were strictly liable for the contamination. The defendants, being not satisfied, appealed to the House of Lords where it was held that irrespective of whether the rule in *Rylands v Fletcher* was treated as a sub-specie of nuisance, 'foreseeability of damage' of the thing likely to do mischief when it escapes was a prerequisite of liability in the law of nuisance.⁹⁰ On this note, the House of Lords held that the defendants were not liable under the Rule in *Rylands v Fletcher*.

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Amirthalingam (n 82).

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Chris Turner and Sue Hodge, *Unlocking Torts* (2nd edn, Hoder Arnold 2007) 287.

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Cambridge Water (n 62).

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ibid 301(Lord Goff).

In the light of the case of *Cambridge waters*, it is clear that ‘foreseeability’ as discussed above is both a requirement in *Rylands v Fletcher* and in the law of nuisance.⁹¹

The assertion of Gerhart⁹² ‘that the doctrine of strict liability is on its death bed’, particularly, in the United Kingdom, having regard to the case of *Cambridge Water Co Ltd* as analysed above, deserves support. Murphy in his article ‘The Merits of *Rylands v Fletcher*,’⁹³ made reference to a New Zealand judge (extra-judicially) who said that: ‘there will never be a case where a plaintiff will succeed in *Rylands v Fletcher* without also succeeding in nuisance’. However, it is clear from case law that there would be no liability (both in nuisance and strict liability) if the defendant’s undertakings which had caused injury to the claimant was expressly authorised by statute, provided there is no negligence on his part.⁹⁴ This suggests that the claimant will succeed in both strict liability and nuisance under this circumstance where negligence is established on the part of the defendant. Furthermore, where the defendant’s conduct is the kind that is not authorised by statute, proof of due care or exercise of reasonableness would not avail the defendant under the strict liability rule as discussed in *Rylands v Fletcher*, suggesting that the claimant will succeed, as it is a ‘no fault’ liability rule. Meanwhile, proof of due care and reasonableness on the part of the defendant would exonerate the defendant in the tort of nuisance in most cases, suggesting that the claimant would not then succeed. This contradicts the above assertion that ‘there will never be a case where a plaintiff will succeed in *Rylands v Fletcher* without succeeding in nuisance’.

However, it is admitted that nuisance and strict liability rule have many features in common, and the requirement of ‘foreseeability of harm’ is one among others. It is submitted that the doctrine of strict liability in *Rylands v Fletcher* would have been more of a ‘stricter liability’ if the requirement of ‘foreseeability’ of harm was not needed by the courts.

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Cambridge Water (n 62). 301-306. See also figure 1.3.2 of this work on ‘the thing likely to do mischief’ which has thrown light on the element of foreseeability.

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Gerhart (n 81).

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John Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24 OJLS 643.

⁹⁴

Dunne v North Western Gas Board [1964] 2 QB 806, 835-837 (CA).

1.4.2 Negligence

Towards the end of the 18th century judges established the doctrine of negligence which was premised on grounds that the defendants ought to be liable for being reckless, particularly where they cause foreseeable loss or injury to the claimant.⁹⁵ In essence, the defendant must exercise 'care' in his dealings in order to avoid causing damage to his neighbour which will attract liability in law. The principle of negligence was then extended in the case of *Donoghue v Stevenson*,⁹⁶ where Lord Atkin stated, that:

...You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question....⁹⁷

The above principle as established by Lord Atkin in the *Donoghue* case is otherwise known in law as the 'neighbour principle' and it is based on the same requirement of 'foreseeability of harm'⁹⁸ as is required in *Rylands v Fletcher* and nuisance as earlier discussed. From Lord Atkin's position as stated above, there are basic elements which the claimant must establish in order to succeed in a claim of negligence. The claimant must establish that the defendant owed him a duty of care, and that there is a breach of that duty and finally that the breach has occasioned damages.⁹⁹

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Turner and Hodge, *Unlocking Torts* (n 88) 63.

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[1932] AC 562 (HL).

⁹⁷

Donoghue (n 64) 580 (Lord Atkin).

⁹⁸

Turner and Hodge, *Unlocking Torts* (n 88) 65.

⁹⁹

ibid.

Gerhart has contended¹⁰⁰ that courts should determine the responsibility for accidental acts by taking into consideration the usual requirement of ‘reasonability’, in that regard, the issues needed to determine liability should be ‘whether the defendant took due care’ and secondly ‘whether the defendant’s conduct was reasonable’. Gerhart was of the view that the application of the above questions in determining liability will abolish the name of ‘strict liability’ but will preserve the current objective of strict liability; which, according to him is to allow the courts to impose liability on a defendant who has caused unreasonable harm to others through its activities.¹⁰¹

According to Gerhart, a close reading of the decisions of courts on strict liability reveals that the defendant’s activities which consequently occasioned harm are measured with the scales of ‘unreasonableness’ and consequently apply the label of ‘strict liability.’ In essence, Gerhart is calling that ‘strict liability’ should be submerged into the common law doctrine of ‘negligence’.¹⁰² Gerhart has openly assaulted the doctrine of strict liability when he said: ‘Strict liability is a doctrinal shadow, and the attempt to perpetuate the notion of strict liability is an analytical failure that seeks to prove what the law is thought to be, rather than what the law manifestly is. The emperor of strict liability doctrine has no clothes.’¹⁰³ Gerhart’s attack on the strict liability rule, particularly on the need to submerge the rule under other related torts as shown above may not be given total support. This is because, the strict liability rule has been considered unique, particularly in isolated escapes and ultra-hazardous activities of the defendant.¹⁰⁴

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Gerhart (n 81) 246.

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Gerhart (n 81) 246.

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ibid 258.

103

Gerhart (n 81) 246.

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See discussion in figure 1.6 entitled: ‘Is the strict liability doctrine still alive?’

1.4.3 Meaning of Due Care and Reasonable Foreseeability: The Connection between Nuisance and Negligence

Foreseeability of damage is a requirement in the law of nuisance.¹⁰⁵ Whilst addressing the issues on the law of Negligence, it was pointed out that the defendant must have exercised due care and avoid acts or omissions which could be reasonably foreseen to cause injury to his neighbour.¹⁰⁶ In this vein, it is submitted that acting unreasonably and/or exhibiting lack of care for a foreseeable harm could result to a claim in nuisance and negligence. In essence, it could be stated that nuisance is an act of negligence and vice versa. Two pertinent questions to address are: at what point can one say that the defendant has manifestly exhibited 'reasonable care?', secondly, what could be the standard for measuring 'foreseeability of harm', since everyone has its foresight on different circumstances?

In determining the first question which borders on the standard for measuring 'due care', the English case of *Bolam v Friern Hospital Management Committee*¹⁰⁷ would provide a useful legal response. In that case the plaintiff who was suffering from mental illness, was given treatment in the defendants' hospital without being warned of the risk of fracture involved, although the risk of fracture was very minimal. No relaxant drugs or manual control (save for support of the lower jaw) were used, but a male nurse stood on each side of the treatment couch throughout the treatment. When the treatment was given in the defendants' hospital, the plaintiff sustained fractures. It was admitted in the course of the proceedings that the use of relaxant drugs would have removed the risk of fractures. Also, there were two competent opinions suggesting that if relaxant drugs were not used, manual control should be used. Furthermore, different views were held among competent professional men on the question of whether a patient should have been expressly warned about risk of fracture before being treated, or should be left to inquire what the risk was; and there was evidence in the course of the proceedings that in cases of mental illness, explanation of risk might well not affect the patient's decision whether to undergo the treatment or not.¹⁰⁸ The plaintiff brought a claim

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Cambridge Waters (n 62) 301 (Lord Goff).

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Donoghue (n 96).

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[1957] 2 All ER 118 (QB).

¹⁰⁸

against the defendants for negligence, alleging the failure of the defendants not to use relaxant drugs or some form of manual control, and in failing to warn him of the risk involved before the treatment was given. McNair J, whilst responding to the issues, defined negligence as:

Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action.¹⁰⁹

McNair J further stressed: ‘how do you test whether this act or failure is negligent?’¹¹⁰ In response, and in setting the ultimate standard which became known as the *Bolam Test* for determining ‘due care’, McNair J said:

Counsel for the plaintiff put it in this way, that in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent.¹¹¹

From the foregoing, it could be extrapolated that what amounts to ‘due care’ will vary based on the jurisdiction and the perception of reasonably competent persons involved, and in determining what is ‘reasonable,’ the courts will consider what the standard is, that is obtainable in that sphere and this will come from the most competent individuals. It was made clear that since the defendants acted in accordance with a practice of competent respected professional opinion, and being in line with one of the two practices obtainable in electro-convulsive therapy, then, it would be wrong to hold that the defendant was negligent. McNair J was very precise when he said: ‘A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men

Bolam (107).

109

Bolam (n 107) [121].

110

Bolam (n 107) [121].

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Bolam (n 107) [121].

skilled in that particular art.’¹¹² McNair J went further to enter a caveat to the aforesaid test¹¹³ when he said that:

...That does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion.

It is pertinent to note that the personal belief of the defendant regarding what amounts to reasonable care does not suffice. Such belief, if it will be adhered to, ought to conform to a standard practice of a contemporary professional opinion.

In the case of *Caparo Industries plc v Dickman and others*,¹¹⁴ Lord Bridge pointed out that the three criteria for the imposition of a duty of care were: (a) foreseeability of damage, (b) proximity between the party owing the duty and the party to whom it is owed, and (c) that the situation should be one in which the court considers fair, just and reasonable that the law should impose a duty of care.¹¹⁵ In the case of *Chandler v Cape plc*¹¹⁶ the claimant (Chandler) brought a claim under negligence for contracting asbestosis as a result of exposure to asbestos dust during his employment with a subsidiary company (CBP) of the defendant (Cape plc). The judge found that the asbestos dust was allowed to escape from the factory without any regard for the consequences. It was maintained that the risk of asbestos-related disease from exposure to asbestos dust was obvious and there could be no doubt that the defendant should have foreseen the risk of injury to the claimant,¹¹⁷ given that the defendant controlled at least some aspects of the business of CPB (the subsidiary) and had assumed responsibility for

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Bolam (n 107) [122].

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The standard or test established in *Bolam v Friern Hospital Management Committee* (n 107) is otherwise known as the Bolam test by several authors.

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[1990] 2 AC 605 (HL).

¹¹⁵

ibid 617 – 618 (Lord Bridge).

¹¹⁶

[2012] EWCA Civ 525, [2012] 3 All ER 640.

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CBP's employees,¹¹⁸ including medical care. In essence, there was a causal link between the parent company and its subsidiary.

The defendant appealed on the grounds that there is no link between the defendant and the claimant since the claimant only worked for CBP, a subsidiary of the defendant. Arguing that the fact that defendant (Cape) is the parent company of Mr Chandler's employer does not of itself give rise to duties to protect the respondent from injury at work.¹¹⁹ This appeal was dismissed. The question was whether the defendant should assume responsibility for the 'negligence' of its subsidiary? In the course of the proceedings, the Court of Appeal made reference to Lord Goff's obiter in the case of *Smith v Littlewoods Organisation Ltd*,¹²⁰ where Lord Goff observed that there is in general no duty to prevent third parties causing damage to another, but with certain exceptions, example where there was a 'relationship between the parties which gives rise to an imposition or assumption of responsibility on the part of the defendant'.¹²¹ The Court pointed out in the *Chandler* case that a subsidiary and its company are separate entities, and there is no imposition or assumption of responsibility by reason only that a company is the parent company of another.¹²² But it was observed that Cape was issuing instructions about the products of its subsidiary in accordance with its company policy,¹²³ thereby suggesting a significant level of control activities of CBP.¹²⁴ It is submitted

For the meaning of foreseeability of harm see figure 1.3.2 on 'the thing likely to do mischief if it escapes' and figure 1.3.2.1 on 'what is a dangerous thing?'

118

Chandler (n 116) 641.

119

Chandler (n 116) 650 [37].

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[1987] 1 All ER 710, 729.

121

Chandler (n 116) 655 [63].

122

ibid 656 [69].

123

ibid 658 [73].

124

that a parent company would be liable for injuries caused by its subsidiary if claimant can show that sufficient degree of proximity between the parent company and the subsidiary in question exists. In the *Chandler* case, Arden LJ reasoned that the law might impose responsibility on a parent company for the health and safety of its subsidiary's employees in circumstances where: (i) the business of the parent company and subsidiary were in a relevant respect the same; (ii) the parent had, or ought to have superior knowledge on some relevant aspect of health and safety in the particular industry; (iii) the subsidiary's system of work was unsafe as the parent company knew, or ought to have known; and (iv) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection.¹²⁵ These aforementioned circumstances form a fourth condition to be considered alongside the three-fold test mentioned above in the *Caparo* case. In *Thompson v Renwick Group Plc*,¹²⁶ the Court of Appeal applied the three-fold test in the *Caparo* case as well the four circumstances mentioned in the *Chandler* case in establishing negligence against a parent company, but concluded that there is no evidence that the Appellant (Renwick Group Ltd) at any time carried on any business at all with the respondent's employer (David Hall & Sons Ltd, a subsidiary of the Appellant) apart from that of holding shares in David Hall & Sons Ltd and others who earlier employed the Respondent (Thompson).¹²⁷ In view of the foregoing, the Court maintained that there is no basis upon which a conclusion can be reached that Renwick Group Ltd either did have or should have had any knowledge of the risk (exposure to asbestos dust) superior to that which the subsidiaries (Respondent's employers) could be expected to have.¹²⁸ Consequently, Appellants' appeal was allowed. It follows that the three-fold test maintained in the *Caparo* case¹²⁹ by the House of Lords as well as the four circumstances mentioned in the *Chandler*

ibid 658[75].

¹²⁵

Chandler (n 116) 641 (Arden LJ).

¹²⁶

[2014] EWCA Civ 635.

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ibid [37] (Underhill LJ).

¹²⁸

ibid [38].

¹²⁹

case above,¹³⁰ and further reiterated in *Thompson* case, remain the standard in determining cases of negligence.

Having considered the basic elements required to establish a case of strict liability and other related common law branches such as nuisance and negligence, it is pertinent to bear in mind that there is a high level of similarity in terms of the basic elements required to establish liability under the strict liability rule as established in *Rylands v Fletcher* and the other related concepts as enumerated.

1.5 Basic Defences to the Strict Liability Rule

Although, from the enumeration of the case of *Rylands v Fletcher*,¹³¹ it seems from the decision of the court that ‘strict liability’ is imposed on the defendant who deliberately¹³² engages in dangerous activities,¹³³ a cursory look at the outcome of the case reveals that the liability on the defendants is not absolute. Some courts and authors use the terms ‘strict liability’ and ‘absolute liability’ interchangeably to indicate liability of the defendant without proof of negligence or fault.¹³⁴ Woodside stated¹³⁵ that the primary difference between the two concepts is that under the strict liability rule, there are defences which are available to the defendants, whereas in cases of absolute liability there are no defences that will prevent the claimant from obtaining damages. On this note, it will be necessary to look briefly at the basic defences which can be available to the defendant under the strict liability rule.

Caparo Industries (n 114).

130

Chandler (n 116) 641.

131

Rylands v Fletcher (n 11).

132

It is shown in the *Rylands* case that the defendant must have foresight that the ‘thing’ is the kind that would cause mischief. That is, foreseeability of harm is a prerequisite for liability.

133

See figure 1.3.2.1 on the meaning of a dangerous thing.

134

Frank C Woodside and others ‘Why Absolute Liability under *Rylands v Fletcher* is Absolutely Wrong’ (2004) 29 (1) *University of Dayton Law Review* 1, 6.

135

Woodside and others (n 134).

1.5.1 Statutory Authority

A statute may impose a duty on the defendant to carry out a particular task which might lead to the escape of a substance that would cause injury to the claimant.¹³⁶ This defence can be raised by the defendant in cases of strict liability actions, stating that the entire 'act' which has caused damage to the claimant was authorised by the law of the place which the damage was caused. The two major conditions in raising this defence are that the defendant must not be negligent on his part and secondly, the damage caused must be the 'inevitable consequence' of the exercise of the statutory powers.¹³⁷ In the case of *Charing Cross Electricity Co v London Hydraulic Power Co*,¹³⁸ the claimant's underground electric cables were damaged as a result of the escape of water maintained at high pressure from the defendant's underground mains. Both the claimants and the defendants were companies carrying on undertakings for profit, for the purpose of which they had obtained statutory permission and under powers granted by Acts of Parliament. The court held the defendants liable on the ground that the escape of water causing nuisance to the claimant was as a technical error on the defendants' engines¹³⁹ and the 'statutory powers' only permit the provision of water for industrial purposes. In essence, there was no duty to maintain water under high pressure and therefore the 'escape' was not the inevitable consequence of the exercise of the statutory powers.¹⁴⁰

1.5.2 Consent of the Claimant

Another defence which can be raised by the defendant in a case of strict liability is that the claimant consented either expressly or impliedly to the presence of the source of danger, but there must be no negligence on the part of the defendant.¹⁴¹ This defence simply illustrates the

¹³⁶

Turner and Hodge, *Unlocking Torts* (n 88) 346.

¹³⁷

See also the case of *Dunne v North Western Gas Board* [1964] 2 QB 806, 835-837 (CA).

¹³⁸

[1914] 3 KB 772 (CA).

¹³⁹

Charing Cross Electricity Co (n 138) 782 (Lord Sumner).

¹⁴⁰

Turner and Hodge, *Unlocking Torts* (n 88) 346.

¹⁴¹

Latin maxim: ‘Volenti non fit injuria’, which serves as a defence in legal actions, and it means that one who has voluntarily entered into an agreement cannot complain of an injury which arises as a result of that agreement. However, it is pertinent to point out that this defence appears not to be utilised or seen in oil and gas cases, as inhabitants of oil producing areas cannot be seen to give consent to environmental degradation and its attendant harm on human health.

1.5.3 Act of a Stranger

A defendant will escape liability in an action under *Rylands v Fletcher* where he can show that the escape of the ‘thing’ which has caused damage was caused by an unforeseeable act of a stranger.¹⁴² In the case of *Perry v Kendricks Transport Ltd*¹⁴³ a child threw a lighted match into an empty petrol tank which exploded and injured the claimant. The court held that the defendants were not liable under the rule in *Rylands v Fletcher* since the conduct which resulted to the explosion were the acts of a stranger over whom the defendants had no control. The defence of ‘act of a stranger’ is significant within the framework of environmental liability in Nigeria, particularly with regard to oil spills caused via sabotage. In the Nigerian case of *Anthony Atubin & ors v Shell Petroleum Development Company Nigeria Ltd*,¹⁴⁴ the Court maintained that even if oil spillage had caused damage to the plaintiff, the defendant could not be held liable for the damage that was caused by mischievous third party in the absence of negligence.

Against the above stance, there is the proposition in law that the defendant is liable for escapes caused by a third party where the defendant ought reasonably to have foreseen the act of the third party and had adequate control of the premises to be able to control it.¹⁴⁵ This

Winfield and Jolowicz On Tort (n 42) 778.

¹⁴²

ibid 779.

¹⁴³

[1956] 1 All ER 154 (Jenkins LJ) (CA).

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Unreported Suit no UCH/43/73 of 21/11/1974 (High Court of Ughelli Nigeria).

¹⁴⁵

John Murphy, *Street on TORTS* (12th edn, OUP 2007) 481.

literally presupposes that nobody is actually a ‘stranger’, provided there is a causal link between the defendant and the activities of the ‘third party’.

In the case of *Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd*,¹⁴⁶ the issue was raised before the London High Court regarding whether Shell could be liable under the Oil Pipelines Act 2004 (OPA) in Nigeria to pay just compensation for damage caused by oil from its pipelines that has been released as the result of illegal bunkering and/or illegal refining? The Court responded to the issue in the negative,¹⁴⁷ observing that looking at existing case law, judges are reluctant to find Shell liable where the spillages have been caused by third party interference either under the Oil Pipelines Act or at common law. The Court observed further that liability can lie where there is neglect on the part of oil operators, and such neglect has been proved to be the cause of preventable damage to the pipeline by people illegally engaged in bunkering which causes damage.¹⁴⁸ This has been admitted by the Court as a difficult thing to prove, but there is the ‘theoretical possibility’.¹⁴⁹ In view of the foregoing, it is submitted that the defence of ‘act of a stranger’ is not conclusive in that the courts would still examine the defendants’ actions and/or inactions with a view to establishing due diligence.

1.5.4 Default of the Claimant

In a case of strict liability, the defendant will not be held liable if the damage is caused solely by the act or default of the claimant himself.¹⁵⁰ In the case of *Ponting v Noakes*,¹⁵¹ the claimant’s horse was poisoned as a result of eating leaves of a yew tree which grew upon the

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[2014] EWHC 1973 (TCC).

¹⁴⁷

ibid [93] (Mr Akenhead).

¹⁴⁸

Bodo Community (n 146) [93].

¹⁴⁹

Bodo Community (n 146) [93].

¹⁵⁰

Winfield and Jolowicz (n 42) 785.

¹⁵¹

[1894] 2 QB 281 (QB).

defendant's land and died. The Court held that the defendants are not liable for damages since the injury sustained by the horse was as a result of wrongful intrusion on the defendant's land. Also, there was no escape of vegetation.

1.5.5 Act of God

The defence of 'Act of God' can be used by the defendant in circumstances where the escape of the thing which has caused damage occurred in natural circumstances without the intervention of the defendant or which no human foresight can provide against.¹⁵² This defence was upheld in the case of *Rylands v Fletcher*, when Blackburn J, referring to the bringing of the 'thing' by the defendant said: 'He can excuse himself by showing that... the escape was the consequence of vis major or the act of God'.¹⁵³ In practical terms, it is noted that whether a particular incident would amount to an act of God is a question of fact.¹⁵⁴ Rogers had observed that the criterion under this defence is whether human foresight and prudence could reasonably recognise the possibility of the event which has caused injury.¹⁵⁵ This latter position can easily be linked with the level of reasonability and prudence required under the discussion of the defence of 'acts of a third party', which ordinarily requires exhibition of reasonable foresight on the part of the defendant in acting against preventable damage of a stranger, so that the defendant may escape liability where there was no reasonable foresight of the harm. Conversely, having regard to the strict nature ('no fault liability') of the doctrine of strict liability, accidental escape which is caused by forces of nature can be classified within the risk which the defendant must accept by accumulating substances on his land.¹⁵⁶

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Winfield and Jolowicz (n 42) 783.

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Rylands (n 11) [6] (Blackburn J).

¹⁵⁴

Winfield and Jolowicz (n 42) 783

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ibid 784.

¹⁵⁶

Winfield and Jolowicz (n 42) 784.

Within the context of oil and gas pollution incidents, the defence of Act of God is synonymous with the defence of 'force majeure', which ordinarily cover incidents that are beyond the reasonable control of TNCs. However, it is worth mentioning that no force majeure is essentially contractual in the English jurisdiction. 'Act of God' or 'frustration' operates as part of the common law. Whereas, in most jurisdictions outside the common law, it is essential that parties in oil and gas agreements negotiate on incidents that would amount to force majeure.¹⁵⁷

The defence of 'Act of God' remains vague, except the occurrences that can be considered as 'Acts of God' are expressly mentioned in a relevant instrument. However, it is certain that irrespective of the incidents that form part of 'Acts of God', foreseeability of harm and negligence on the part of the polluter will form determinant factors in apportioning liability. Oil TNCs in Nigeria are mostly enmeshed in incidents leading to proclamation of force majeure. Recently, Exxon Mobil had declared force majeure in its oil production due accidental damage on a subsea pipeline linked to Qua Iboe (crude-export facility) by a drilling rig.¹⁵⁸ Again, force majeure was declared on 4th and 8th of August, 2016 by Shell Petroleum Development Company of Nigeria on its gas supply to Nigeria NLNG.¹⁵⁹

It is acknowledged that the force majeure clause in petroleum contracts allows TNCs to stop deliveries without breaching the contracts.¹⁶⁰ In this vein, Delaume had maintained that Force Majeure clauses are essentially intended to provide parties in contractual commitments with a 'cooling-off period' and permit them to resume in due course the normal course of their relations.¹⁶¹ But on the impact of alleged 'force majeure' incidents on the environment with

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Muriel Marmursztejn, 'Force majeure clauses of an oil company's upstream agreements: a review' (1998) 7 International Business Law Journal 781, 784-787.

¹⁵⁸

Bloomberg, 'Exxon declares force majeure as Nigeria's production drops again' *Energy Voice* (14th May 2016) <<https://www.energyvoice.com/oilandgas/africa/109520/109520/>> accessed 12 June 2016.

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Femi Asu, 'Shell declares force majeure on gas supply to NLNG' *Punch News* (Nigeria, 10 August 2016) <<http://punchng.com/shell-declares-force-majeure-gas-supply-nlng/>> accessed 12 June 2016.

¹⁶⁰

Bloomberg (n 158).

¹⁶¹

regards liability, it is obvious that TNCs must show that such incidents were not foreseen and due care was exercised in the circumstance in order to escape liability.

1.6 Is the Strict Liability Doctrine Still Alive?

This research has put much emphasis in comparing the strict liability doctrine with other related terms with a view to determining the essence of the doctrine and the fate of victims of environmental pollution caused by oil and gas pollution. The question whether the strict liability doctrine is still in existence is crucial, and it is one that requires careful analysis. In the course of this research, the principle of strict liability as enunciated by Blackburn J in the well-known case of *Rylands v Fletcher*¹⁶² and other related common law principles (such as nuisance and negligence) have been clearly shown. In *Rylands v Fletcher* and other related cases which established the principle of strict liability, four basic elements which constitute the legal firmament under which the doctrine can be said to apply were discussed. The four basic elements for establishing the defendant's liability are that; the defendant must have been said to bring the 'thing' which has caused damage to the claimant on the defendant's land, the thing must be something that is likely to do mischief if it escapes, the thing must be a non-natural use of land, and finally, the thing must escape. It is implied that the absence of proof of any of the aforementioned elements will amount to a shortcoming in establishing liability under strict liability principle. The major issue that has always arisen in most arguments on the existence of the doctrine of strict liability is whether having regard to the legal battle in establishing the aforementioned elements, whether it will be logical to say that the liability in *Rylands v Fletcher* is 'strict', or whether the doctrine is still alive?

Some authors, in their arguments in support of the need to expunge the doctrine of strict liability as established in the case of *Rylands v Fletcher* have argued that the common law tort of nuisance is the most appropriate to replace the tort of strict liability, while others have argued that the common law of negligence almost serve the same purpose to that of strict liability.¹⁶³ The general assumption has always been that the doctrine of strict liability as found in the case of *Rylands v Fletcher* imposes absolute liability on the defendant. This

Georges R Delaume, 'Excuse for Non-Performance and Force Majeure in Economic Development Agreements' (1971) 10 Columbia Journal of Transnational Law 242, 244.

¹⁶²

Rylands (n 11).

¹⁶³

Gerhart (n 81) 246.

latter assumption that strict liability in the case of *Rylands v Fletcher* imposes an absolute liability on the defendant was made clear by Avinst¹⁶⁴ in the 1970's. This latter view has been common, and according to Avinst if a person is engaged in an extra hazardous activity, and as a result of such activity causes damage to the land belonging to another, he is legally responsible for the damage, irrespective of the fact that the person was careful or whether there was any trace of fault.¹⁶⁵ Avinst equally mentioned that the rules of 'absolute liability' and what he described as 'absolute nuisance' in relation to ultra-hazardous activities of the defendant are the same, but with different terminology.¹⁶⁶ It is clear that Avinst seems to apply the terms of strict and absolute liabilities interchangeably, and this position does not conform to existing legal literature and argument in the current research. Furthermore, even the attempt to link strict liability principle to extra hazardous activities of the defendant has been frowned at in the *Cambridge Water Case*. Lord Goff observed as follows: 'I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by parliament, than by the courts.'¹⁶⁷ In essence, placing incidents of high risk under the rule of strict liability cannot be considered as a general principle except it is clearly spelt out by relevant enactment.

In the light of the decision of the House of Lords in the case of *Cambridge Water Co Ltd v Eastern Counties Leather Plc*,¹⁶⁸ it can be pointed out that there are similarities between the common law doctrine of strict liability as established in the case of *Rylands v Fletcher* and the tort of nuisance. This similarity can be depicted from the obiter of Lord Goff when he pointed out, inter alia, that the liability of a person who has created a nuisance remains strict irrespective of the fact that reasonable care was taken and that a defendant cannot be held

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Alfred Avinst, 'Absolute liability for oil spillage' (1969-1970) 36 Brooklyn Law Review 359, 360.

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Avinst (n 164) 360.

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Avinst (n 164) 366.

¹⁶⁷

Cambridge Water Co Ltd (n 62) 305 (Lord Goff).

¹⁶⁸

Cambridge Water Co Ltd (n 62) 301-306.

liable for damage of a type which he could not reasonably foresee.¹⁶⁹ In essence, the requirement of foreseeability in establishing nuisance and strict liability are the same. However, the uniqueness of the strict liability rule was identified by Lord Goff in the Cambridge Water case when he maintained that:

... It would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated.¹⁷⁰

On the other hand, it is hard to trace larger similarities between the strict liability requirements as established in the case of *Rylands v Fletcher* and that of negligence. In the tort of negligence, as it is plainly explained in the case of *Donoghue v Stevenson*,¹⁷¹ the requirement of 'foreseeability' and that of 'reasonable care' are obviously interwoven in the sense that whilst the defendant is expected to know that the 'thing' is likely to do mischief, he is also expected to take reasonable care to ensure that there is no injury caused to his neighbour. On the other hand, in strict liability, the defendant is only required to have the knowledge that the thing brought to the land is likely to do mischief (foreseeability), but the defendant will be liable for any damage caused if the 'thing' escapes irrespective of whether he is negligent or not. Blackburn J when referring to the strict nature of the doctrine of strict liability in the case of *Rylands v Fletcher* stated thus:

...The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault....¹⁷²

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Cambridge Water Co Ltd (n 62) 300.

¹⁷⁰

Cambridge Water Co Ltd (n 62) 306 (Lord Goff).

¹⁷¹

Donoghue (n 96) (HL).

¹⁷²

Rylands (n 11) 6.

In the light of the above it is clear that it is immaterial whether the escape of the thing which has caused damage was as a result of negligence or not. The point to note in the above statement of Blackburn J is that ‘foreseeability of the risk’ is a primary element for the recovery of damages under the rule of strict liability, and that the doctrine of strict liability is made manifest in the sense that the defendant will be held liable regardless of the fact that he has exercised all ‘due care’ to prevent any escape or harm. Gerhart asserted that: ‘All of the legitimate “work” of strict liability can be and is being done better under the negligence regime by asking whether the injurer made reasonable decisions about activity-based matters’.¹⁷³ It is maintained that Gerhart’s opinion on absorbing the tort of strict liability within the common law tort of negligence is fallacious. This is because of the unique characteristics of the strict liability tort which actually does not take into cognizance the recklessness of the defendant.

In the light of the above it is clear that liability under *Rylands v Fletcher* is strict even in cases of isolated escape of the ‘thing’ *likely* to do mischief. This implies that the fact that the defendant has exercised reasonable care over the thing which has escaped does not exonerate him from liability. Lord Goff has equally distinguished the concepts of ‘reasonable user’ and ‘reasonable care and skill’. Whilst the former is an element in cases associated to strict liability, the latter is a *sine qua non* in the common law tort of negligence. Lord Goff, while making this distinction in the *Cambridge Water* case, said:

... If the user is reasonable, the defendant will not be liable for consequent harm to his neighbour's enjoyment of his land; but if the user is not reasonable, the defendant will be liable, even though he may have exercised reasonable care and skill to avoid it.¹⁷⁴

In the light of the above, it is shown that it is more logical and legal to associate the doctrine of strict liability to the tort of nuisance than associating it to the tort of negligence.

1.7 A Critical Analysis of the Doctrine of Strict Liability as Established in *Rylands v Fletcher*: Its Applicability in Nigerian Oil and Gas Pollution Liability Regime

The facts and elements of the case of *Rylands v Fletcher* have been established in the early part of this chapter. It is pertinent to point out that there are various statutory legal provisions

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Gerhart (n 81) 246.

¹⁷⁴

Cambridge Water Co Ltd (n 62) [71].

in Nigeria relating to the liability of environmental pollution, and in reflecting on the doctrine of strict liability in Nigeria, such statutory provisions form the basis and guidelines for determining liability.

There is no doubt that the determination of the liability of transnational oil corporations in Nigeria on issues of environmental pollution caused by oil and gas has been very uncertain and complex. This uncertainty in the determination of such legal issues relating to environmental pollution has led to many victims of oil and gas pollution in Nigeria seeking for legal redress in foreign countries. A report on Reuters¹⁷⁵ reveals that Nigerian Fishermen and Farmers alongside Friends of the Earth Campaign Group brought a claim against Royal Shell Dutch in The Hague, on the grounds of oil pollution to the Niger Delta region. The report reveals that Shell denied responsibility to the pollution case on the ground that the pollution was caused by sabotage (acts of a third party). The Report,¹⁷⁶ has also shown that it was the first time an oil pollution case was brought against Shell in a Dutch court for offences alleged to have been carried out by one of its subsidiaries. The issues and challenges emanating from the aforesaid report and others form some aspects of this research.

Findings have shown that there are two basic ways in which disputes relating to oil and gas pollution are resolved between multinationals and the local communities (victims) in Nigeria. The first and most peaceful method has been through Alternative Dispute Resolution (ADR) which basically entails a negotiation (parties to the dispute are actively involved on the terms of settlement) process.¹⁷⁷ Interestingly, there are other remarkable methods under ADR with almost similar traits. Chatterjee¹⁷⁸ has rightly drawn the differences between the methods. Chatterjee maintained that a conciliator is obliged to guide the parties to the disputes by

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Anthony Deutsch and Ivana Sekularac, 'Nigerian villagers sue Shell in landmark pollution case' (2012) Reporting for Reuters. < <http://www.reuters.com/article/2012/10/11/us-shell-nigeria-lawsuit-idUSBRE8991SE20121011>> accessed on 5 May 2014.

¹⁷⁶

Deutsch and Sekularac (n 175).

¹⁷⁷

KSA Ebeku, 'Compensation for damage arising from oil operations: Shell Petroleum Development Company of Nigeria v Ambah Revisited' (2002) 7 IELTR 155.

¹⁷⁸

Charles Chatterjee, *Alternative Dispute Resolution: A Practical Guide* (Routledge 2008).

pointing out their strengths and weaknesses with a view to convincing them on the legal consequences of instituting a lawsuit, without intervening, personally, in the dispute.¹⁷⁹ An arbitrator resolves disputes from a legal standpoint,¹⁸⁰ whilst a mediator suggests what would be best in the course of a dispute with exercise of authority on the possible outcome of the terms of settlement.¹⁸¹ Whilst it is necessary for parties to consider the most suitable method for out-of-court settlement, it is submitted that in cases of oil and gas pollution, it is advisable that parties resort to conciliation and negotiation, this is because there is the need for both parties to be directly involved in the settlement process whilst still maintaining a cordial relationship in the communities. In this vein, Chatterjee maintained that ‘the connotation of the term “conciliation” necessarily implies that it is a method whereby differences between parties may be settled by friendly means’.¹⁸²

Secondly, disputes are resolved through litigation, but findings have shown that the option of litigation is mostly utilised as a last resort where the victims of oil pollution have failed to achieve any meaningful outcome from the ADR method.¹⁸³ But whether disputes are resolved via ADR or through court room litigation, there are embedded principles of liability attached therein.

Findings have shown that where oil and gas pollution are caused by the wilful act of the claimant or the act of a third party, which can best be described as ‘sabotage’, the defendants will not be held liable in law. In the Nigerian case of *Anthony Atubin & Ors v Shell Petroleum Development Company Nigeria Ltd*,¹⁸⁴ the plaintiffs brought a claim against the defendant for damages done to their crops as a result of escape of oil from the pipelines

¹⁷⁹

ibid 19.

¹⁸⁰

Chatterjee (n 178) 18.

¹⁸¹

Chatterjee (n 178) 20.

¹⁸²

ibid 23.

¹⁸³

Ebeku (n 177).

¹⁸⁴

owned by the defendant. The defendant stated that the escape was a malicious act of third parties. In dismissing the claim, Ovie Whiskey J, stated that:

... The hole in the pipe was deliberately drilled by an unknown mischievous person over whom the defendant company had no control. Even if the oil spillage had caused damage to property or fishing right of the plaintiff, in this case, the defendant could not be held liable for the damage which was caused by mischievous third party in the absence of any negligence on their part....¹⁸⁵

In the course of this chapter, reference has been made to the English case of *Perry v Kendricks Transport Ltd*¹⁸⁶ where the court held that the defendants were not liable under the rule in *Rylands v Fletcher* since the conduct which resulted to a petrol tank explosion were the acts of a stranger over whom the defendants had no control. Hence, the defence of ‘Act of a stranger’ (which is basically connected to acts of pipeline or oil installation sabotage)¹⁸⁷ is very much applicable in Nigeria having regard to the *Anthony Atubin’s*¹⁸⁸ case mentioned above. It is obvious that where the damage which resulted from the escape of the ‘dangerous thing’¹⁸⁹ is caused by the mischievous act of a third party, then the defendant will be exonerated from liability without the need to establish ‘foreseeability of damage’ as required in strict liability claims. Also, by virtue of the provision of section 11(5)(c) of the Oil Pipelines Act 2004,¹⁹⁰ the holder of a licence (oil companies) is exonerated from any kind of

Unreported Suit no UCH/43/73 of 21/11/1974 (High Court of Ughelli Nigeria).

185

Anthony Atubin (n 184).

186

Perry (n 136) (Jenkins LJ).

187

‘Strangers’ include: illegal oil bunkers, pipeline vandals and every act of third parties without causal link to the oil operators.

188

Anthony Atubin (n 184).

189

See figure 1.3.2.1 for the meaning of a dangerous thing.

190

Cap O7 LFN 2004, s 11(5) (c).

liability caused by oil and gas pollution as a result of the default of the claimant or ‘the malicious Act of a third person.’¹⁹¹

In the Nigerian case of *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*,¹⁹² the claimants brought a claim for damages against the defendant as a result of the escape of crude oil from the oil pipelines operated by the defendant which has caused damage to the claimants. The claimants relied on the strict liability rule as established in the case of *Rylands v Fletcher*. Ovie Whiskey J (as he then was) stated that ‘...to lay crude oil carrying pipes through swamp forest land is a non-natural user of the land’. From that judgement, it was crystal clear that crude oil is a dangerous thing if allowed to escape from the pipelines. Despite the above findings, the Court refused to apply the strict liability rule under *Rylands v Fletcher* as requested by the plaintiff on the grounds that the activities of the defendants fell under the exception of ‘statutory authority’ since they are operating under the licence issued by the Federal Republic of Nigeria.¹⁹³ By virtue of the Oil Pipelines Act,¹⁹⁴ obtaining a licence from the Nigerian government permits the holder to lay oil pipelines. Notwithstanding the above position of the Court, the defendants were held liable to pay compensation in line with section 11(5)(c) of the Oil Pipelines Act.¹⁹⁵ Section 11(5)(c) of the Oil Pipelines Act imposes a direct liability on the holder of a license to pay compensation to persons who have suffered damage as a consequence of any breakage or leakage from the

¹⁹¹

Oil Pipelines Act (n 190), s 11(5) (c).

¹⁹²

[1973] MWSJ 61 (Ovie Whiskey J).

¹⁹³

[1973] MWSJ 61 (n 192). See also Ayodele O Akinsola, ‘Civil Liability for Oil Pollution under Nigerian Law’ The Nigerian Institute of Advance Legal Studies (Journal of Law and Public Policy) 315 <<http://www.nials-nigeria.org/journals/Ayodele%200Oladiranlawp>> accessed 4 June 2014.

¹⁹⁴

Oil Pipelines Act (n 190), s 11(1) (2).

¹⁹⁵

Oil Pipelines Act (n 190), s 11(5) (c).

pipeline. The only exception as provided in the aforementioned provision, is in circumstances where the leakage is caused by the act of the claimant or the malicious act of third parties.¹⁹⁶

In the light of the above Nigerian case of *San Ikpede* and the provisions of the Oil Pipelines Act, it is maintained that the defences of ‘statutory authority’ and the ‘malicious act of a third party’ are bona fide defences which are generally applicable in cases of strict liability both in the English Jurisdiction and the Nigerian cases in environmental pollution brought under the rule in *Rylands v Fletcher*. On the other hand, a close look at the case of *San Ikpede*¹⁹⁷ and the provisions of section 11(5)(c) of the Oil Pipelines Act,¹⁹⁸ reveals that polluters will be strictly liable for pollution caused by oil and gas in circumstances where the oil pipeline leakage occurred independent of the act of the claimant or that of a third party. This is because from the case of *San Ikpede* and the provisions of section 11(5)(c) of the Oil Pipelines Act, the defence of ‘statutory authority’ does not remove liability from the environmental polluters in payment of compensation. Furthermore, the court in the case of *San Ikpede*¹⁹⁹ has equally described ‘crude oil’ as a dangerous thing at its escape from the oil pipelines. This presupposes, that the requirement of ‘foreseeability of harm’²⁰⁰ in cases of oil and gas pollution, are automatic once there is an escape of crude oil from the pipelines to the claimant’s land. Victims of oil and gas pollution in Nigeria need not prove foreseeability of harm in order to establish liability in oil and gas pollution; the larger part of the onus, in a strict liability case will ordinarily fall on the defendants to prove that the leakage of crude oil from the pipeline, which has caused damage, was as a result of the act of third parties. In essence, a causal link must be established between the spill and the external forces.

¹⁹⁶

Oil Pipelines Act (n 190), s 11(5) (c).

¹⁹⁷

San Ikpede (n 192).

¹⁹⁸

Oil pipelines Act (n 190), s 11(5) (c).

¹⁹⁹

San Ikpede (n 192).

²⁰⁰

See figure 1.3.2 on the requirement of foreseeability of harm in the strict liability doctrine.

The principle of strict liability was made far clearer in the Nigerian case of *Machine Umudje & Anor v Shell-BP Petroleum Development Company Nigeria Ltd*,²⁰¹ where the plaintiffs instituted a claim for damages for the ‘escape’ of oil waste from the defendant’s pit which caused damage to the plaintiff’s ponds, farmland and lakes. The court of first instance awarded damages to the plaintiffs, the defendants (Shell) not satisfied proceeded on appeal to the Supreme Court. The Supreme Court held the defendant (Shell) liable for the damage caused to the plaintiffs in line with the rule under *Rylands v Fletcher*. While dismissing the defendant’s appeal, the Supreme Court held (Idigbe JSC), that:

Liability on the part of an owner or the person in control of an oil-waste pit, such as the one located at location ‘E’ in the case in hand, exists under the rule in *Rylands v Fletcher* although the “escape” has not occurred as a result of negligence on his part.²⁰²

From the outcome of the case of *Machine Umudje*,²⁰³ it is clear that once the court can establish a case of ‘escape’ of crude oil from a place in control of the polluter to the claimant’s premises, then liability will arise insofar as damages can be proved. The Supreme Court in Nigeria has made it explicit that proof of negligence is not necessary in cases under *Rylands v Fletcher*. Frynas is of the view that *Machine Umudje*’s case has illustrated that the legal rule of strict liability in *Rylands v Fletcher* can increase the chances of victims of oil pollution to succeed in oil related cases in Nigeria since the proof of negligence is not required, but that ‘proof of negligence’ might be required in other less-dangerous things.²⁰⁴ The position of the Supreme Court in *Machine Umudje*’s case may have been different if the pollution was caused by an escape of crude oil from a damaged vessel in the Nigerian waters. By virtue of section 4(2)(a) of the Oil in Navigable Waters Act,²⁰⁵ where there is an oil pollution caused as a result of the damage of an oil vessel the polluter will be exonerated

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[1975] 19-11 SC 155.

²⁰²

Machine Umudje (n 201) 172.

²⁰³

Machine Umudje (n 201).

²⁰⁴

Jedrzej G Frynas, *Oil in Nigeria: conflict and litigation between oil companies and village communities* (Lit Verlag 2000).

from liability if reasonable steps were taken to stop or reduce the escape of the crude oil. This provision seems to be in line with the legal requirement in establishing cases of negligence or nuisance, which is of ‘reasonable care’ and ‘reasonable user’ respectively.

A further look at Regulation 23 of the Petroleum (Drilling and Production) Regulation²⁰⁶ which is an offshoot of the Petroleum Act,²⁰⁷ reveals, inter alia, that where a licensee exercises his rights in a manner which is ‘unreasonably to interfere’ with any fishing rights, he shall pay adequate compensation to any person who has suffered injury. The qualification: ‘unreasonably to interfere’ can be seen to be in line with the requirement of ‘reasonable user’ of land in the case of nuisance, and on the other hand, entails the requirement of ‘escape’ under strict liability in *Rylands v Fletcher*. It has been established in the case of *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*²⁰⁸ that laying of crude oil pipes is a non-natural user of land, and that the requirement of escape of the crude oil from the pipes is a *sine qua none* in establishing cases under strict liability.

1.8 The Nature and Scope of the Doctrine of Absolute Liability

Having looked at the nature and scope of the principle of strict liability and its limitations in judicial interpretation, it is necessary to consider the meaning of the concept of absolute liability. Rogers’s comment on strict liability flags up the key difference:

Liability under the rule (*Rylands v Fletcher*) is strict in the sense that it relieves the claimant of the burden of showing fault; however, it is far from absolute since there are a number of wide-ranging defences.²⁰⁹

²⁰⁵

Cap O6 LFN 2004, s 4 (2) (a).

²⁰⁶

Petroleum (Drilling and Production) Regulation 1969, reg 23.

²⁰⁷

Cap P10 LFN 2004.

²⁰⁸

San Ikpede (n 192).

²⁰⁹

Winfield and Jolowicz Tort (n 42) 763.

A cursory look at the above comment on the doctrine of strict liability reveals that even if a claimant needs not show any fault on the part of the defendant in establishing liability, there are a series of defences at the disposal of the defendant which have been discussed earlier, and that because such defences, if properly presented can vindicate the defendant, it therefore follows that the absence of the availability of any defence in law will confer an absolute liability on the defendant. Absolute liability can therefore, be literally defined as the kind of liability that is imposed upon anyone without any defences. Waite pointed out in his article entitled ‘the quest for environmental law equilibrium’ that in cases of absolute liability, it is unnecessary to prove either causation or fault on the part of the defendant.²¹⁰ In essence, in absolute liability it is arguably unnecessary to say the pollution which has caused damage(s) to the claimant was an act of a third person. To avoid clumsy repetition, a more adequate analysis of the concept of absolute liability within the context of fundamental rights violations is provided in chapter 6.²¹¹ On the other hand, in strict liability cases the requirement of proof of both causation and fault is relevant because the defendant can be exonerated in circumstances where the damage is caused by a third party as shown in the case of *Perry v Kendricks Transport Ltd*²¹² under the defence of ‘Act of a Stranger’. With regard to the non-absolute nature of the strict liability rule, Rogers observed that, ‘Liability under the rule is strict in the sense that it relieves the claimant of the burden of showing fault; however, it is far from absolute since there are a number of wide-ranging defences.’²¹³

Furthermore, elements of the doctrine of absolute liability can be traced in the United Kingdom by virtue of the provision of the Environmental Protection Act 1990.²¹⁴ A combined reading of section 78F (1), (2), (3), (4) and (5) of the aforementioned Act, reveals that for the

²¹⁰

Andrew Waite, ‘The quest for environmental law equilibrium’ (2005) 7 ELR 34, 39.

²¹¹

See figure 6.4.1 on the technical meaning of the term ‘absolute’.

²¹²

[1956] 1 All ER 154 (Jenkins LJ) (CA).

²¹³

WVH Rogers, *Winfield & Jolowicz Tort* (n 42) 763.

²¹⁴

Environmental Protection Act 1990.

purpose of determining liability or establishing the appropriate person to bear responsibility in cases of contamination of land, the owner or occupier for the time being of the contaminated land will be held responsible; the owner or occupier would be responsible where no reasonable inquiry could reveal the appropriate person. In essence, the defence of ‘Act of a Stranger’ could be successful if the contamination is caused by a third party who is identifiable through ‘reasonable inquiry’. It would suffice to say therefore, that where oil pollutions are caused via sabotage, and the saboteurs could not be traced, multinationals will definitely be the ‘appropriate persons’ to bear responsibility in the context of the Environmental Protection Act 1990. In applying the principle of absolute liability in environmental pollution, the claimant needs only show that there is an escape of the polluting substance, regardless of the cause or fault of such pollution. This principle is adequately analysed in chapter 6 of the research within the framework of fundamental rights relating to a safe environment.

1.9 Strict and Absolute Liabilities in Criminal Offences

Principles of strict and absolute liability can equally be traced in criminal offences. There are criminal offences relating to environmental pollution. For instance, there is the Harmful Waste (Special Criminal Provisions) Act,²¹⁵ particularly section 6 of the Act which imposes criminal liability on polluters of the environment ranging from carrying and dumping of harmful waste in the air, land or waters of Nigeria save with the consent of a lawful authority. Strict liability offences have been defined by Lord Edmund while making reference to ‘Smith and Hogan on Criminal law’ in the English case of *Whitehouse v Gays News*²¹⁶ when he said: ‘... an offence is regarded- and properly regarded- as one of strict liability if no *mens rea* need be proved as to a single element in the *actus reus*’. The displacement of the element of ‘*mens rea*’ in strict criminal liability seems to contradict the basic principles of criminal procedure law which emphasises the need to prove beyond reasonable doubt, which entails showcasing the mental element or intention of the accused person. Reid²¹⁷ submitted that it is in areas relating to protection of the public and protection of the environment that is probably

²¹⁵

Cap H1 LFN 2004.

²¹⁶

[1979] AC 617, 656 (HL).

²¹⁷

Kiron Reid, ‘Strict Liability: Some Principles for Parliament’ (2008) 29 SLR 173, 174.

the greatest consensus among academic commentators and Judges in support of strict liability.

1.10 The Nature of Liability in International Environmental law: The Trail Smelter Arbitration

Over the years, most countries have embraced the old Roman law rule that no person has a right to cause significant, foreseeable harm to others.²¹⁸ One relevant case which has adopted this same principle of establishing liability where harm is foreseeable is the *Trail Smelter Arbitration*²¹⁹ which was between farmers in the United States and a Canadian smelter. The Canadian smelter damaged the crops of the U.S. farmers through the emission of fumes. The U.S farmers instituted a case in an international tribunal against the Canadian smelter through international arbitration. The Arbitral tribunal was primarily governed by the Ottawa Convention of 1935,²²⁰ entered into by the U.S. and the Dominion of Canada, which sets out the aims and the procedural rules to follow by the members of the panel. One of the primary aims of the Arbitral Panel as set out in the Convention was to decide whether damage caused by the Trail smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefore?²²¹ A close perusal of the entire report (Trail Smelter), reveals that the Panel was not actually concerned with whether the smelters were ‘negligent’ or whether there was a ‘foreseeability’ of harm from their smelting activities, what seems to be the primary concern of the Tribunal was whether damage has occurred, and the cause of such damage(s). Whilst concluding on the issue of whether damage was suffered by the complainant (U.S.) and the cause of such damage, it was stated that:

²¹⁸

Robert V Percival, ‘Liability for environmental harm and emerging global environmental law’ (2010) 25 Maryland Journal of International Law 37, 39.

²¹⁹

Trail Smelter Arbitration (United States/Canada), (1938) Vol III (Reports of International Arbitral Awards) 1905-1982.

²²⁰

Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail (signed at Ottawa) 15 April 1935.

²²¹

See Article 3 of the Convention (n 213).

... Since the tribunal has concluded that, on all the evidence, the existence of injury has been proved, it becomes necessary to consider next the cause of the injury. This question resolves itself in two parts—first, the actual causing factor, and second, the manner in which the causing factor has operated.²²²

In the light of the above, it is clear that the Tribunal was solely focused by virtue of the Convention to establish a nexus between the said injury suffered by the U.S. government and the activities of the smelting company. The Arbitral Panel, while awarding damages to the U.S. farmers, stated that:

... Under the principles of international law, as well as of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence....²²³

In the light of the above dictum, it is obvious that liability is direct where the victim has suffered injury and such injury has been linked to the acts or omission of the defendants. But there appears to be a loaded qualification by ‘clear and convincing evidence’ as contained in the above report of the Tribunal. In essence, what is the content or nature of evidence that will amount to being ‘clear and convincing’ in order to warrant liability? The response to this question could better be determined by the ‘Tribunal’, but having regard to the facts of the case and the outcome of the arbitral award, what is ‘clear and convincing’ could be the ability of the ‘experts’ to link the damage suffered to the ultra-hazardous activities of the Trail Smelter. The most valuable message of the tribunal’s award in the *Trail Smelter Arbitration* is that states have a duty to curtail trans-boundary environmental harm, and that there is an obligation to pay compensation for the harm they cause.²²⁴ This aforesaid requirement in the *Trail Smelter* case seems to be in line with principles of absolute liability, since none of the defences associated with the strict liability rule was mentioned as exonerating factors in the entire arbitration proceeding having regard to the fact that the tribunal was governed by law

²²²

Trail Smelter Report (n 219) 1920-1921.

²²³

Trail Smelter Report (n 219) 1920-1921.

²²⁴

Miriam Mafessanti, ‘Responsibility for environmental damage under international law: can MNCs bear the burden...and how?’ (2009-2010) 17 Buffalo Environmental Law Journal 87, 88.

and practice followed in dealing with cognate questions in the United States as well as in international law and practice.²²⁵ But this is not to draw a conclusion on the acceptable measure of liability for environmental pollution cases in international law. The principle of state responsibility is further discussed in chapter 5 which has shown that liability principles under international law, in later cases, hovers around principles of the tort of negligence and the strict liability rule.²²⁶

1.11 Conclusions

This chapter has considered the concepts of strict and absolute liabilities. Whilst it is obvious from the content and analysis of this chapter that the doctrine of strict liability was established by the courts as a common law concept, it is shown that the doctrine of absolute liability is mostly applicable where a statute or any written provisions makes the liability of polluters ‘absolute’ without any of the exceptions mentioned under strict liability.²²⁷ This chapter has maintained a legal gap which serves as the difference between the two aforementioned concepts. This is done with a view to avoid the misnomer of using the terms of strict and absolute liability interchangeably. In the same vein, related common law concepts of trespass to land, nuisance and negligence have been adequately discussed because these principles do manifestly possess certain similarities in law, and in most cases arguments could emerge as to which legal scenario can best be suitable under any of these concepts.

It must be borne in mind that this research is geared towards ascertaining whether the doctrine of absolute liability may be applied to the principle of the protection of the environment in cases of fundamental rights violation proceedings involving oil operators in Nigeria. Hence, the purpose of this chapter is to reflect on the doctrine of strict liability which is more closely related to absolute liability and the standards of liability in other related torts by expatiating the current position of these concepts in Nigeria, the UK, as well as in the

²²⁵

See Article IV of the Ottawa Convention as contained in the Trail Smelter Arbitral Award (n 220).

²²⁶

See figure 5.6 on the measure of liability applicable in international environmental law.

²²⁷

The basic defences to the strict liability rule as mentioned in figure 1.5 are: statutory authority, consent of the claimant, act of a stranger, default of the claimant and act of God. These defences are not applicable in the case of absolute liability.

international perspective with a view to testing their respective relevance or applicability to fundamental rights enforcement proceedings relating to environmental pollution. Once the concept of strict liability is fully grasped, then, appreciating the concept of absolute liability becomes uncomplicated; for absolute liability simply means strict liability without any exceptions. In the context of this research, both strict and absolute liabilities are only interpreted in relation to the dangerous activities²²⁸ of the claimant, particularly, oil and gas activities of TNCs.

There has been a heavy reliance on judicial cases in the English jurisdiction whilst expatiating on the common law concept of strict liability. The majority of these cases have been correlatively shown to be persuasive in Nigerian courts. Basically, English law becomes even more relevant to Nigeria where there are lacunae in the Nigerian legal system. It is noteworthy to mention that one major source of Nigerian law is the 'received English law'. The 'received English law' includes; the common law, doctrines of equity and the statutes of general application, being laws made before 1900.²²⁹ This simply implies that the English common law is automatically received in Nigeria but subject to Nigerian legislation²³⁰ and necessary changes which might emerge due to variance in government policies, and this is evidently shown in the mixture of English and Nigerian laws in determining liability in the *Bodo Community*²³¹ case, which relates to claims for compensation regarding oil spill incidents from pipelines that occurred in Nigeria but determined in a London Court.

The next chapter addresses issues of fundamental rights as a tool for environmental protection. It focuses on creating awareness on the correlation between environmental pollution and fundamental rights violation. Decisions of the European Court of Human Rights as well as English Courts were given credence in this regard. Above all, it stretches

²²⁸

See figure 1.3.2.1 on the meaning of a dangerous thing. Activities relating to oil and gas of multinationals are generally classified within the scope of 'dangerous things'.

²²⁹

VI Mbu, 'Problems of the Nigerian Legal System in the light of the Analytical Jurisprudence of Norzick and Rawls' (1994) 6 Sri Lanka J Int'l L 111, 117.

²³⁰

ibid.

²³¹

Bodo Community Case (n 146).

the importance of fundamental rights as contained in Chapter IV of the Nigerian Constitution²³² and the African Charter on Human and Peoples' Rights.²³³

²³²

Constitution of the Federal Republic of Nigeria 1999 (as amended).

²³³

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap A9 LFN 2004.

CHAPTER 2

AWARENESS OF FUNDAMENTAL RIGHTS AS A TOOL FOR ENVIRONMENTAL PROTECTION

2.1 Introduction

In one of the four hypotheses through which this research is underpinned, it is asked whether there is any legal nexus between environmental pollution and breach of the fundamental rights of people? In response, this chapter explores issues bordering on awareness of fundamental rights as a vehicle for environmental protection. Although little credence has been given to this aspect in the law, and this dimension should have been directly incorporated into it, particularly in Nigeria,¹ a pertinent question is: why should environmental protection be treated as an issue relating to fundamental rights? A series of reasons may be put forward, but in the context of this research it is submitted that incorporating fundamental rights into principles of environmental protection would secure higher standards of environmental quality (fundamental rights are known to be given higher status over and above other rights) due to the requirement of states to provide a satisfactory environment for citizens,² thereby, securing the rights to health, life and peaceful enjoyment of private and family life.³ This is more practical, as it is argued in chapter 6 of this research that enforcement of environmental rights would be based on the principle of absolute liability. For instance, on a scale of zero to ten (0-10), with 5 being 'strict liability' and 10 being 'absolute liability', environmental liability under fundamental rights enforcement, as argued in chapter 6 of the current research should be pinned under 9, with limited space left for illegal activities of 'third parties' where pollution is shown to be manifestly unavoidable in events relating to illegal oil bunkering and acts of sabotage by vandals.⁴ It is argued, nevertheless, that this liability ought to be absolute when such activities of 'third parties' are

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The recently decided case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd* [2005] AHRLR 151 (Federal High Court) is the first judicial pronouncement and locus classicus on the enforcement of fundamental rights to a clean environment in Nigeria.

²

Section 20 of the Nigerian Constitution, 1999 (as amended) requires the State to protect and improve the environment, albeit this obligation is precatory.

³

Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613.

foreseeable, and if transnational corporations (TNCs) are proactive and diligent enough in curbing pollution, they would forestall such acts of third parties.⁵

All the aforementioned rights are embodied in the right to a safe or healthy environment (directly implying the right to health). In this regard, The Committee on Economic, Social and Cultural Rights, in its General Comment on Article 12 of the International Covenant on Economic, Social and Cultural Rights (adopted on 16 December 1966), characterises the Right to Health as:

An inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information...⁶

In the light of the foregoing, Marks and Clapham have maintained that human rights law cannot purport to protect a right not to fall ill or have disease.⁷ In essence, there are limitations to the right to health, but more importantly, emphasis must be placed on the *cause* of the individual's health challenges. For instance, within the context of the current research, if the *cause* of the violation of the right to health is traceable to activities of oil transnational corporations or government, then an action for enforcement of the aforementioned fundamental rights can be sustained.

The current research retains a comparative methodology approach, and in view of limited case law in Nigeria to support an argument for breach of fundamental rights in incidents of environmental pollution, reference is made to similar trends in foreign jurisdictions, particularly in England and Wales, and case law from the European Court of Human Rights (hereinafter 'ECtHR'). This move, is imperative owing to the mandate imposed on Nigerian

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⁵ The rationale for this proposition is justified in chapter 6, more particularly in figures 6.4, 6.4.1 and 6.5.

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⁷ See figure 6.4.1 on the meaning of 'absolute liability' and its usage within the framework of fundamental rights violations.

⁸

⁹ The right to the highest attainable standard of health: 11/08/ 2000 (General Comment N0. 14).

¹⁰

¹¹ Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 200.

courts by the Fundamental Rights (Enforcement Procedure) Rules 2009 (Hereinafter ‘FREP Rules’), to respect regional and international bills of rights and freedom in advancing fundamental rights of individuals.⁸ In the same vein, the English law remains relevant to the Nigerian legal system.⁹ Principles of law and judgments of foreign jurisdictions within the ambit of environmental pollution and fundamental rights violations as deployed in the current chapter are necessary. In this regard, Zweigert and Kotz have reasoned that:

When judges of a superior court are faced with a difficult problem of principle it is surely wrong for them to disregard solutions and arguments which have been proposed or adopted elsewhere just because they happen to emanate from foreign courts and writers.¹⁰

The current chapter has exposed the legal jurisprudence and minor misconceptions in the use of the terms: ‘human rights’ and ‘fundamental rights’, and their relevance to the principle of the protection of the environment. Whilst the phrase ‘human rights’ could be utilised as a generic concept to include both enforceable and moral rights, only fundamental rights (rights encapsulated in legal instruments with legal backing) can be enforced by a court of law. It is observed that whilst the international community is busy discussing vexed issues of environmental protection, no significant attempt had been made to link the environment with fundamental rights.¹¹ It is worth mentioning that the current research is concerned with advancing environmental pollution incidents as a matter of fundamental rights.

This chapter demonstrates that the right to life, dignity of human person and the right to private and family life can be interpreted to include environmental rights, having regard to striking decisions from the ECtHR, the English courts and the Nigerian courts. This chapter also considers a salient doctrine known as the ‘margin of appreciation’ or the ‘balancing of

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FREP Rules, para 3 (b) of Preamble.

⁹

Lee J McConnell, ‘Establishing liability for multinational companies in parent/subsidiary relationships’ (2014) 16 ELR 50, 53.

¹⁰

Konrad Zweigert and Tony Kotz, *Introduction to Comparative Law* (3rd edn OUP 1998) 20.

¹¹

Lawrence Atsegbua, ‘Environmental Rights, Pipeline Vandalisation and Conflict Resolution in Nigeria’ (2001) IELTR 5, 89. It was noted that the African Charter on Human and Peoples’ Rights (1981) was the first international instrument to proclaim the right to a satisfactory environment as a human right.

interests’ as utilised by the ECtHR and the English courts in determining liability in human rights cases. Whilst it has been shown that the ECtHR is a unique and focal point for addressing violations of the Convention rights¹² amongst contracting parties of the European Union,¹³ its decisions are persuasive and subsidiary to English national courts.¹⁴

Most land-mark judicial cases decided by the Nigerian courts, ECOWAS (Economic Community of West African States) Court of Justice and the African Commission have reflected on the principle of the protection of the environment through fundamental rights enforcement by giving considerable importance to the right to life and dignity of the person as enshrined in the Nigerian Constitution and the African Charter.¹⁵ Cumulatively, courts usually hold governments and oil TNCs culpable for violating fundamental rights relating to a safe environment where they overstep the ‘margin of appreciation’,¹⁶ act without due diligence, or fail to show reasonableness in the handling of hazardous activities as equally mentioned throughout the discussion in chapter 6 of this research.

2.2 What are Human Rights?

Various writers have given diverse meanings to the concept of human rights, albeit the concept as it is being used in the legal parlance may be a relatively recent concept,¹⁷ there are

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European Convention on Human Rights and Fundamental Freedoms 1950.

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The ECtHR was established as a full-time Court by virtue of Protocol 11 of the Convention (n 12). Few decided cases with regard to environmental pollution and human rights violations by the Court are mentioned under figure 2.3.

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See the case of *Hatton v UK* [2003] All ER (D) 122: a judgment of the European Court of Human Rights affirming the subsidiary nature of its judgments before national Courts.

¹⁵

See chapter 6 of the research, particularly figure 6.4 on the discussion relating to fundamental rights violation in environmental pollution incidents in Nigeria.

¹⁶

This doctrine was first utilised by the ECtHR in the case of *Powell and Rayner v UK* (1990) 12 EHRR 355 to express the balancing of interests between the rights of the individual and the interest of the state. See figure 2.3 on the discussion relating to the doctrine.

¹⁷

Christopher McCrudden, ‘Human Rights Histories’ (2005) 35 OJLS 179.

various ancient schools of thought who promulgated theories that underpin the modern use of the phrase, 'human rights'. Twining has conceptually distinguished between enforceable and non-enforceable human rights respectively as human rights law and human rights morality.¹⁸ He posits that a coherent moral theory of human rights may include rights that may not be immediately enforceable or claimable or which may not be suitable for being legalise for other reasons.¹⁹ Darren, referred to Geoffrey Robertson's opinion that one can read the ten-commandments, in the Christian Holy Bible as implying certain basic rights. For instance, 'Thou shalt not steal' seems to suggest the right for individuals to own private properties.²⁰ Thomas Aquinas (1225-1274) was equally of the view that human dignity and value are innate properties which are validated according to natural law.²¹ The aforementioned views strengthen the concept of human rights which are more of faith or religious background.

Furthermore, the German philosopher, Immanuel Kant (1724-1804) is often credited with laying the ground work for modern understanding of human rights as ethical practice.²² He laid a foundation which suggests that human rights were distinct from those civil rights accorded to citizens of a state by the government of that state.²³ In essence, whilst human rights could best be described as a moral obligation amongst citizens of any society, such rights are not enforceable by the government of that state. This is against the concept of civil liberties, which are rights recognised and enforced by the state. It is in line with the latter that Jeremy Bentham (1748-1832) spoke derisively at the idea of natural law, and of human rights

¹⁸

William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP Cambridge 2009) 182.

¹⁹

ibid.

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DJ O'Bryne, *Human Rights: An Introduction* (Pearson 2003) 28.

²¹

James W Harris, *Legal Philosophies* (OUP 2004) 8, 9.

²²

O'Bryne (n 20).

²³

ibid

in general, as ‘nonsense on stilts’ on the grounds that such laws and rights are non-justiciable. It is deducible from Bentham’s position that ‘human rights’ is not an abstract phenomenon rooted in natural laws but are rights invented by humans out of necessity. This aforementioned position is corroborated by Hannah Arendt (1906-1975), that the only fundamental right exists within the political community itself- that is, the right to maintain the right to life, liberty and others.²⁴ It is maintained that Jeremy Bentham’s articulated attack on natural law as ‘nonsense on stilts’, and other theories against the non-binding nature of natural law must have ignored the fact that at the time when Thomas Aquinas²⁵ and his natural law apologists considered principles of natural law as constituting ‘law’, the legal regime was remarkably dominantly centred on divine or religious norms, and such laws or religious norms were equally enforced within the society where they apply. It could only be accepted that the people’s awareness on the concept of ‘law’ during Bentham’s period must have outgrown the stage of enforcing natural laws, thereby necessitating the embodiment of principles of right and wrong into codes. But that is not to rule out the validity of ‘natural law’. It is against this background that Bix entered a caveat to the effect that:

...The context of Aquinas’ approach to law-that the theory of law appears as a small piece or application of a larger theological-moral system-should be kept in mind when comparing his work with more recent theorists.²⁶

Bix’s warning is understandable and imperative in that the religious and/or philosophical backgrounds of various jurists have a considerable impact in their various theories. Thomas Aquinas was a known Catholic Priest (a theologian) and this undoubtedly shaped his position on natural law. Conversely, considering Bentham’s postulations on Legal Positivism and Utilitarianism, it is obvious that he is more inclined into practical methods of resolving issues, in essence, he is more of a pragmatist.

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O’Byrne (n 20) 36.

²⁵

The leading exposition of natural law is contained in Thomas Aquinas’s writings in his leading work *Summa Theologiae* which contained the most comprehensive statement of Christian doctrine on the subject of natural law. Aquinas existed between 1225-74 (13th century) as against Jeremy Bentham’s reign which is between 1748-1832 (18th century). See also Raymond Wacks, *Philosophy of law: A Very Short Introduction* (2nd edn, OUP 2014) 4.

²⁶

Brian Bix, *Jurisprudence: Theory and Context* (4th edn, Sweet & Maxwell 2006) 67.

From a practical standpoint and in contemporary legal regime, it is not enough to ascribe all rights as ‘human rights’; if such rights must be sacrosanct, legally binding and enforced, then, they have to be ‘fundamental’. Hence, as society advances, it becomes more necessary that certain rights with higher priorities be encoded and designated as such, with binding rule of action.²⁷

The question which begs for answer is: what do lawyers mean when they speak of ‘human rights’? The two basic aspects of ‘rights’ have been amply captured in the above submissions. That is, Justiciable and non-justiciable rights, and it is only the former that a lawyer considers as fundamental rights when presenting a case for violation of rights before a court of law. This is because non-justiciable rights cannot be enforced, though they can be persuasive. Notwithstanding, it must be admitted that the definition of human rights remains a matter of controversy.²⁸

Phil was of the view that when we speak of ‘human rights,’ we are making statements about a social group’s adherence or non-adherence to a particular moral and political code which contains certain principles.²⁹ Phil’s definition appears vague, but it represents the practical and contemporary usage of the concept of human rights as both enforceable and non-enforceable rights. Rubin had drawn a line of difference between human rights and legal rights. Rubin observed that both concepts are similar in the sense that they ‘represent some claim or entitlement that can be asserted by the human beings in question,’ they are distinct to the extent that:

Legal rights are created by government enactment, and thus constitute the law that citizens are expected to obey, while human rights arise from the essential or non-governmental nature of human beings, and thus constitute the law that is supposed to be obeyed by government officials.³⁰

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Sternberg William, ‘The Origin of Human Rights’ (1939) 24 Marquette Law Review 1, 2.

²⁸

Edward L Rubin, ‘Rethinking Human Rights’ (2003) 9 International Legal Theory 5, 8.

²⁹

Phil Harris, *An Introduction to Law* (6th edn, Butterworths 2002) 95.

³⁰

Rubin (n 28) 9.

Rubin's remark above on the difference between legal rights and human rights can be related to the sharp distinction between fundamental rights and human rights respectively in the current analysis, to the effect that the former are legal rights created by government enactments and consequently enforceable, whilst the latter are merely norms 'supposed to be obeyed', and although captured in documents, lack enforceability. For example, the Universal Declaration of Human Rights 1948 and other international instruments yet to be incorporated into national law can be considered as Human Rights Documents with persuasive effects but do not project fundamental rights.³¹

The Court of Appeal in the Nigerian case of *Uzoukwu & Ors v Ezeonu II & Ors*, whilst drawing a clear distinction between Human Rights and Fundamental rights, maintained that:

Due to the development of Constitutional Law in this field, distinct difference has emerged between "Fundamental Rights" and "Human Rights." It may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights, which every civilised society must accept as belonging to each person as a human being. These were termed human rights. When the United Nations made its declaration it was in respect of "Human Rights" as it was envisaged that certain rights belong to all human beings irrespective of citizenship, race, and religion and so on. This has now formed part of International Law. Fundamental Rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the Constitution.³²

In line with the above, the conundrum with regard using the terms 'human rights' and 'fundamental rights' interchangeably, at least, on technical grounds, has been demystified. In corroborating the above stance of the Court of Appeal that 'fundamental rights remain in the realm of domestic law' and they are rights 'guaranteed by the fundamental law of the country', 'fundamental right' is defined in the Fundamental Rights (Enforcement Procedure) Rules 2009 (FREP Rules) as 'any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act'.³³ In this vein, Ruth and Chinewubeze added that the mode and level of enforcement of rights may depend on whether a provision is contained

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See FREP Rules 2009, para 3 (b) (ii) of the Preamble.

³²

[1991] 6 NWLR (Pt 200) 708 at 761 (Nasir JCA).

³³

in an international or a national instrument.³⁴ It is submitted that national legal instruments encapsulating provisions of ‘human rights’ are usually followed with adequate means of enforcement, meanwhile most international instruments on human rights are precatory and persuasive in nature.

The European Convention on Human Rights, which came into force in 1950, sets out certain principles on human rights which were ratified by the European States. Such principles as contained in the Convention could only be legally protected by individual states when incorporated into their national laws. Such human rights, when incorporated into national laws metamorphose into ‘fundamental rights’. For instance, in the UK, the principles set out in the European Convention on Human Rights were incorporated into the Human Rights Act 1998, thereby making such rights ‘fundamental’ at the state level. This is not to rule out the fundamental nature of the Convention rights at the regional level (Europe), since there are existing mechanisms to enforce such rights at the ECtHR. The point to note is that ‘rights’ that lack necessary enforcement mechanisms cannot be adjudged to be fundamental rights. In Nigeria, the aspect of the Constitution which deals with enforceable rights is designated as ‘Fundamental Rights’.³⁵ This simply implies that the aforesaid ‘rights’ retain higher status over other rights. In this vein, William had observed that:

A right is inconceivable without some rule or norm by which that right is determined. To say that I have a right means that there is a certain binding rule of action, a law, which prescribes a certain course of conduct on the part of another person for my benefit.³⁶

Even if the phrase ‘human rights’ can be used as a generic concept to include ‘fundamental rights’, it is necessary to point it out from the onset that ‘fundamental rights’, in the context of the current research means only rights which can be legally protected. In essence,

FREP Rules, Ord 1, r 2. The awareness of fundamental rights as it relates to a healthy environment in Nigeria is further discussed in figure 2.5 below.

³⁴

Akinbola B Ruth and Chijioke Chinewubeze, ‘Environmental Right and Human Rights Enforcement in Nigeria: Visiting the Nexus and a Call for Reform’ (2011) 2 (2) Human Rights Review- (An International Human Rights Journal-An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, and the National Human Rights Commission of Nigeria) 195.

³⁵

See Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

³⁶

William (n 27) 2.

fundamental rights exist only where the holder of the right can enforce it by bringing an action in law.³⁷ This aforesaid stance is embodied in the legal principle that where there is a law or right, there is equally a corresponding remedy or duty, where such law or right is breached.³⁸

2.3 A Critical Analysis of the Use of Human Rights Actions as a Tool for Environmental Protection from Decisions of European Court of Human Rights and in England and Wales

More recently, human rights scholars and activists have indicated a tremendous interest in utilising human rights based arguments to promote environmental values,³⁹ and this could be, perhaps, due to the fact that most human rights are infringed through harmful environmental activities. Just like in every other aspect of the law, there are legal challenges encountered by legal practitioners in establishing the liability of an alleged violator of fundamental rights. However, these challenges vary, based on the jurisdiction in question.

It is worth mentioning that the principle of the protection of the environment encompasses various aspects of the law which gives support to individual rights and values as it relates to the environment. Just like it is mentioned above,⁴⁰ the idea of vesting certain rights and freedoms to the individual has a long and complex background with various schools of thought, but only relatively recently have these rights been laid down in a binding code, thereby enabling members of the society to pursue their perceived breach of rights with certainty. In a European context, one significant text embedded with a series of rights and values is the European Convention on Human Rights and Fundamental Freedoms 1950 (hereinafter ‘the Convention or ECHR’).⁴¹ The ECHR is basically a fundamental guideline for European countries on the rights and freedoms which it entails, and its mode of

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Phil Harris (n 29) 99.

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This is a maxim of Roman law and well known to common law, couched as ‘Ubi Jus Ibi Remedium’; meaning that whenever a common law gives a right or prohibits an injury, it also gives a remedy.

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Feja Lesniewska, ‘Reviews: Human Rights and Environmental Sustainability’ (2013) 25 JEL 333.

⁴⁰

See figure 2.2 on the concepts of human rights.

⁴¹

Stuart Bell and Donald McGillivray, *Environmental Law* (7th edn OUP 2008) 72.

application is limited in member states in a way that the courts will have to strike a balance between individual rights on one hand and the economic interests and other issues of national interests of the state on the other.⁴² This implies that certain rights can be outweighed if they contradict or are seen to undermine the economic and other national interests of the member states.

Whilst the European Court of Human Rights is vested with the jurisdiction to entertain basic rights and freedoms as contained in the ECHR, the English national courts are vested with Jurisdiction to entertain human rights proceeding as contained in the Human Rights Act (HRA) 1998. Both the ECHR and the Human Rights Act of 1998 contain certain rights which could serve, substantially, as a tool for the protection and preservation of the environment. Whilst it is necessary to note that the rights and freedoms set out in the ECHR are merely persuasive on the courts,⁴³ there are some provisions of the ECHR which are directly incorporated in the Human Rights Act of 1998, thereby, making such provisions binding on the courts.⁴⁴ The more relevant (on environmental protection) Articles of the Convention brought into the UK law as contained in the Human Rights Act are Articles 2 and 8, dealing with the right to life and the right to respect for private and family life, home and correspondence respectively.

It is submitted that Articles 2 and 8 of the Convention rights alongside other Articles as provided for in the Human Rights Act 1998, are not absolute rights. This is pursuant to the provision of section 1(2) of the Act which provides, inter alia, that those rights (Convention rights),⁴⁵ are to have effect for the purposes of the Human Rights Act subject to any designated derogation or reservation.⁴⁶ The aforesaid provision is corroborated by Article 57

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Stuart Bell and Donald McGillivray (n 41).

⁴³

Paul Stookes, *A Practical Approach to Environmental Law* (OUP 2005) 41.

⁴⁴

See section 1(1) (a) (b) and (c) of the Human Rights Act 1998 on the meaning of the 'convention rights' captured in the Act. They include Articles 2-12 and 14 of the Convention, Articles 1-3 of the First Protocol, and Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention.

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The Convention rights as incorporated in section 1(1) of the Human Rights Act 1998.

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of the ECHR, permitting member states to make reservations in parts of the Convention rights which are not in conformity with existing state laws, but the ECHR prohibits reservations of a general character.⁴⁷ The ‘reservations’ and ‘derogations’ have made human rights enforcement actions very uncertain for applicants, as the State seem to give a higher priority to national interest, thereby undermining individual rights as contained in the ECHR and the Human Rights Act. This position is shown in the English case of *Marcic v Thames Water Utilities Ltd.*⁴⁸

Having regard to the above, it should be clear that the courts are vested with the ultimate authority of determining the circumstances that can entrust the loaded rights as contained respectively in the ECHR and the Human Rights Act, to victims of environmental pollution. This, therefore, presupposes the significant role of case-law in determining individual rights as it relates to the principle of the protection of the environment.

The Convention does not directly make provisions relating to fundamental rights to a clean environment. Nevertheless, the European Convention on Human Rights (ECHR) and its subsequent protocols have been utilised by a significant number of victims of environmental pollution in a series of judicial claims as a means to secure an acceptable or standard environment.⁴⁹ It is necessary to consider the potential impact of the ECHR and HRA1998 in order to determine the extent to which they guarantee substantive environmental rights.

In the striking case of *Guerra v Italy*,⁵⁰ the applicants all lived in Malfredonia, a town situated one kilometre away from a chemical factory. The factory’s activities produce large quantities of inflammable gas, which was said to have the potential to cause explosive chemical reactions polluting the air with highly toxic substances. In 1976, following an explosion in

Human rights Act 1998, s 1(2).

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Article 57 of the European Convention on Human Rights and Fundamental Freedoms 1950.

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[2003] UKHL 66, [2004] 2 AC 42.

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Susan Wolf and Neil Stanley, *Environmental Law* (4th edn Cavendish 2003) 481.

⁵⁰

[1998] 26 EHRR 357, [1998] 4 BHRC 63.

the factory, about 150 persons were hospitalised with acute arsenic poisoning and in 1998 the factory was classified as ‘high risk’ pursuant to the criteria laid down in a Presidential Decree 178/88 (implementing Council Directive (EEC) 82/501 on the major-accident hazards of industrial activities dangerous to the environment and the well-being of the local population) and a committee of technical experts found that the geographical location of the factory rendered Malfredonia susceptible to its emissions. Under the aforesaid Decree, the relevant Mayor and Prefect were obligated to inform local inhabitants of industrial hazards, safety measures taken, emergency strategies and the procedure to be followed in the event of an accident. The applicants complained to the European Commission of Human Rights that the Italian authorities had failed, *inter alia*, to provide information on risks and the emergency procedures violating the right to freedom of information as guaranteed to them by Article 10 of the ECHR (Article 10 borders on Freedom of Expression which include the freedom to receive and impart information and ideas without interference by public authority). The Commission expressed the opinion that there had been a violation of Article 10 of the Convention and subsequently referred the complaint to the European Court of Human Rights.

The applicants, in the *Guerra* case equally relied on Articles 8 and 2 of the Convention, with the contention that the failure to provide information had infringed their right to respect for their private and family life and their right to life respectively. The European Court of Human Rights held that the applicability of Article 8 of the Convention was established by the direct effect of toxic emissions on the applicants’ right to private and family life. It was stated that the primary aim of Article 2 of the Convention was to protect the individual against arbitrary interference by public authorities, which mostly entails negative undertakings by the state. The Court further stated that the duty of the state under Article 8 also includes a positive obligation to ensure effective respect for private and family life.⁵¹

The facts of the *Guerra* case also suggest that the production of harmful substances ceased in 1994 before the applicants were given essential information that would have enabled them to assess the risks related to the factory’s emissions. It therefore followed that the state had not complied with its obligation to secure the applicants’ right to respect for their private and family life, thereby violating Article 8. The European Court of Human right disregarded the

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contention on Article 2 since the state had complied with its obligation of rendering information on the risk of the emission, although belated.⁵²

Having regard to the Guerra case, it is no longer in doubt that the right to life and respect for private and family life could be interpreted to include environmental rights. This raises the issue whether these rights could be enforceable in the UK. In the English case of *R (Secretary of state for the home department) v BC and BB*,⁵³ the court stated that Convention rights become civil rights at the moment such rights are incorporated into the Human Rights Act of 1998. It is submitted in the light of the case of *R v BC and BB*, and having regard to the fact that Article 2 and 8 of the ECHR have been incorporated into the Human Rights Act, that the right to life and the right to private and family life respectively are civil rights guaranteed in the UK.

Another important issue for determination is the significance of the Judgments of the European Court of Human Rights on the UK courts. In essence, how effective are the judgments of the European Court of Human Rights to the UK national courts? A combined reading of section 2(1) of the HRA 1998⁵⁴ provides, inter alia, that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account: judgment, decision, declaration or advisory opinions of the European Court of Human Rights, opinions or decisions of the commission, or decision of the Committee of Ministers, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen. It is deducible from the above provision that the qualification, ‘in the opinion of the court or tribunal’ suggests that the judgments of the European Court of Human Rights can only be persuasive but not binding. It is persuasive because the UK national courts or tribunal are only meant to ‘take into account’ such decisions from the European Court. It could be argued that despite the non-binding effects of decisions of the European Courts on Human Rights, it would attract more weight in terms of judicial precedence, since principles of justice requires that ‘like cases are treated

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Guerra (n 50).

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[2010] UKHRR 354 Admin Ct, [2009] All ER 140 (QB).

⁵⁴

Human Rights Act (n 43), s 2(1) (a) (b) (c) (d).

alike’ in order to establish consistency.⁵⁵ In another perspective, it is arguable that once any court or tribunal in the UK is able to ascertain the relevance of a judgment of the European court of Human Rights to a pending case, it automatically becomes an obligation on the former to follow suit. This is because section 2(1) above of the Human Rights Act made use of the verb ‘must’, suggesting a procedural obligation in the circumstance, provided the decision of the ECtHR to be taken into account is relevant to the pending case before the court or tribunal in the UK. Conversely, it is obvious from the aforesaid provision that the courts and tribunals in the UK are allowed a degree of discretion on the credence to be given to judicial cases from the ECtHR, and according to Hoffman and Rowe, this is important owing to the fact that the ‘European Court cases are decided in relation to a wide variety of situations arising in many different countries.’⁵⁶ This is equally understandable having regard to the fact that judges of the European Court are from different legal cultures and backgrounds,⁵⁷ and this is likely to influence their decisions on legal issues before them.

Having considered the relevance and significance of judgments of the European Court of Human Rights, it would be necessary to consider a couple of additional cases of importance to Convention rights. A landmark case is that of *Powell and Rayner v UK*,⁵⁸ where the applicants who lived close to Heathrow airport based their action on Article 8 (right to respect of one’s private life and home) of the Convention rights. The applicants brought their claim on the grounds that the noise pollution from the airport constituted a grievous effect on the quality of their private lives and adversely affected the peace and enjoyment of their home, thereby infringing on their Article 8 rights. For the purposes of appreciating the position of the European Court of Human Rights in this case, it will be pertinent to look at the complete provision of Article 8 of the Convention rights which provides that:

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David Hoffman and John Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (Pearson 2003) 52.

⁵⁶

Hoffman and Rowe (n 55) 52.

⁵⁷

Hoffman and Rowe (n 55) 52.

⁵⁸

(1990) 12 EHRR 355, [1990] ECHR 9310/81.

Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁵⁹

The European Court of Human Rights in a unanimous judgment held, having a full contemplation of the aforesaid provision of Article 8 that there had been no violation of the right to an effective domestic remedy in respect of alleged violations of Article 8. It was equally made clear that the applicants had conceded to the fact that the operation of a major international airport such as Heathrow pursued a legitimate aim (in the interest of the economic well-being of the country) and that the consequential negative impacts on the environment could not be entirely eliminated.

It is submitted from the foregoing that the courts have a more sensitive and significant role to play by striking a balance between the rights of individuals as enshrined in Article 8(1) and the exceptions which can be considered as ‘public interest’ as contained in Article 8(2), because it is clear from that provision that as long as the individual possesses the right to respect for his private and family life, the state could interfere with such rights in the interest of the community.⁶⁰ Fitzmaurice maintained that the fundamental principle of ‘balancing of interests’ between an individual and the community is at the core of the adjudication of cases based on Article 8 of the Convention rights, which was first utilised in the case of *Powell v Rayner*.⁶¹ In fulfilling this obligation of striking a balance between the interests of individuals and states, the courts will have to take into consideration whether the state has complied with its own positive duty of taking ‘reasonable and appropriate’ measures in securing the

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European Convention on Human Rights and Fundamental Freedoms 1950, art 8 (1) and (2).

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European Convention on Human Rights (n 59). The list of circumstances that can be classified as ‘public interest’ is clearly stated in Article 8 (2) of the Convention rights.

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Malgosia Fitzmaurice, ‘The European Court of Human Rights, Environmental Damage and the Applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms (Case Comments)’ (2011) 13 ELR 107, 108.

applicants rights. What could be reasonable and appropriate will be another issue to be determined by the courts having regard to the efforts made by the state.

In the *Guerra* case,⁶² the Italian government failed to provide information which could have served as a precautionary measure for the applicants to avoid the harmful effects of the factory's activities, hence the government was said to have violated the Article 8 rights of the applicants. In *Powell and Rayner's* case, it was evident from the facts of the case that a number of measures were introduced by the UK authorities to control, abate and compensate for aircraft noise at and around the Heathrow Airport. Albeit the state is responsible for setting out the procedures which will justify whether there is a compliance with the Convention rights in Article 8, such procedures will have to be complied with in order to fulfil the requirement of 'reasonability' and 'appropriateness' of the state's action needed to be vindicated in human rights cases.

In the case of *Lopez Ostra v Spain*,⁶³ the applicant and her family lived in a town in Spain. The applicant alleged that the smells, noise and polluting fumes caused by a plant for the treatment of liquid and solid waste situated only a few metres away from her family had breached her article 8 rights of the Convention. The government contended that the special application for the protection of fundamental rights brought by the applicant was an improper means of raising questions of compliance with the ordinary law or the current dispute which is of a scientific nature. The European Court of Human Rights held that the special application for the protection of fundamental rights was an effective and rapid means of obtaining redress, since such procedure could curtail further waste and activities from the plant, and that the applicant is not under any obligation to bring a different kind of proceedings.

In determining Lopez Ostra's rights under the Convention, the Court considered the basic issue whether the state has complied with its positive duty to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1) of the Convention rights, or in terms with an 'interference by a public authority', whether the state has acted in line with the aims of Article 8(2). In determining the issue, attention was paid to the issue of striking a fair

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Guerra v Italy (n 50).

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[1994] 20 EHRR 611, [1994] ECHR 16798/90.

balance between the competing interests of an individual (the applicant's effective enjoyment of her right to respect for her home and her private and family life) on the one hand, and of the community on the other. It was emphasised by the Court that the public aims mentioned in Article 8(2)⁶⁴ are relevant, but that in the instant case, the municipality had not only failed to take steps necessary for the protection of the applicant's right as contained in Article 8(1) but had also resisted judicial decision to that effect. As a result, the Court held that the state had failed in striking a fair balance required, and accordingly, there had been a violation of Article 8 of the Convention.

In the light of the case of *Guerra*⁶⁵ and the latter case of *Lopez Ostra*, it has become an established case law principle that in striking a balance in human rights-based arguments, the European Court on Human Rights would take into consideration the positive steps which the State has taken to subvert any act that will infringe the Convention rights amply captured in section 8(1). Furthermore, it is clear that the Convention rights can be enforced against incidents of environmental pollution, even if the right to a clean environment is not explicitly provided for under the Convention rights. In corroborating this stance, Murdoch had observed, while commenting on the *Lopez Ostra* case that 'Strasbourg case-law now clearly establishes that environmental protection may indeed indirectly fall within the scope of Convention guarantees.'⁶⁶ Murdoch further admitted that the provision in Article 8 (Enjoyment of Private and Family Life) of the Convention rights is wide enough to include threats to physical well-being.⁶⁷ The current analysis of the ECtHR cases is to establish the link between environmental pollution and fundamental rights violation at the international level, and how this principles have gained their way into the English jurisdiction (through the

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The public aims which justify the state's interference on the individual's right to respect for private and family life, home and correspondence, are contained in Article 8(2).

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Guerra (n 50).

⁶⁶

Jim Murdoch, 'Environmental Protection within Scope of European Convention (Case Comment)' (1997) 59 SPEL 17-18.

⁶⁷

Murdoch (n 66).

Human Rights Act); and being a comparative research work, the Nigerian perspective is considered with very limited case law available in this regard.⁶⁸

In another landmark case of *Hatton and others v United Kingdom*,⁶⁹ with almost similar facts to the *Powell and Rayner*⁷⁰ case discussed above, the applicants lived in the vicinity of the Heathrow airport and alleged that their sleep had been regularly disturbed by aircraft noise at night. The alleged disturbance was pursuant to the increment of night flights by the 1993 night quota scheme. The introduction of the scheme, in effect, increased the number of night flights due to its 'economic benefits'. The applicants averred before the European Court of Human Rights, inter alia, that the level of aircraft noise at night amounted to an unjustifiable interference in their private lives as contained in Article 8(1). In a Chamber judgment, the Court held that the government had not taken sufficient steps to protect the applicants Article 8 rights in devising the 1993 scheme.

On appeal, the Grand Chamber reversed the initial judgment and ruled that the role of the Convention was essentially a subsidiary one, and that, national authorities had direct democratic legitimation, and were, in principle, better placed than an international court to evaluate local needs and conditions. The Grand Chamber equally emphasised that Article 8 could apply in environmental cases in circumstance where the pollution is caused directly by the state or where the state had failed to regulate private industry. In either case, it was stated by the Grand Chamber that fair balance had to be maintained between the competing interests of the individual and the community. Having regard to the terms of the 1993 scheme, and having considered the substantive merits of the state's decisions to ensure compatibility with Article 8 rights of the individual, the Court held that the government had not overstepped its margin of appreciation, which indicates the striking of a balance between individuals and states with regard to the discretion enjoyed by the state.

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It is shown that the link between environmental pollution and fundamental rights violation was only recently substantially addressed in *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd* [2005] AHRLR 151 (Federal High Court, Benin Judicial Division).

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[2003] 37 EHRR 611, [2003] All ER (D) 122.

⁷⁰

Powell and Rayner (n 58).

It is worth mentioning that the modus utilised by the European Court of Human Rights in *Powell and Rayner*⁷¹ and that of *Hatton*⁷² are in line with one of the grounds justified by Article 8(2) under which a state could interfere with the rights under Article 8(1), and such grounds is where the alleged infringement is caused as a result of the ‘economic well-being of the country’.⁷³

A striking case on the position of the English Courts on issues of human rights based argument for environmental protection, was the case of *Marcic v Thames Water Utilities Ltd.*⁷⁴ In that case, the defendant was a statutory sewerage undertaker, responsible under the Water Industry Act 1991 (as amended) for providing sewers for the removal of sewage and surface water in which the claimant’s house was situated. From the facts of the case, there were sufficient sewers to meet the needs of residents, but because of subsequent structures in the area, the claimant’s property has been flooded as a result of inadequate sewers. The aforementioned Water Industry Act makes provision for the Water Services Regulation Authority,⁷⁵ and The Secretary of State exercises similar powers alongside the Authority,⁷⁶ who has legal powers to enforce the obligations of a sewerage undertaker by means of enforcement orders.⁷⁷ In essence, where there are inconveniences or foreseeable damage to be

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Powell and Rayner (n 58).

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Hatton (n 69).

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See Article 8 (2) of the Convention Rights.

⁷⁴

[2003] UKHL 66, [2004] 2 AC 42.

⁷⁵

Water Industry Act 1991, s 1(1A). The Office of the Director General of Water Services which was initially vested with powers to enforce orders within the water industry as it was in the *Marcic* case, has been abolished by virtue of the Water Act 2003, s 34(4).

⁷⁶

See the Water Act 2003 s 39(3). See also the Water Industry Act 1991 (as amended) s 2(2A)-(2E) on the powers of the Authority and Secretary of State in ensuring that the functions of water and sewerage undertakers are properly carried out.

⁷⁷

Water Industry Act 1991, ss 18-22 of the Act make provision for enforcement orders.

suffered by a resident, such complaints are made to the Regulator, who in effect makes an enforcement order against the sewerage undertaker(s).⁷⁸ A claimant could only bring up an action against the sewerage undertaker who failed to execute the enforcement order. Hence, the enforcement procedure is the only remedy available to a person who alleges a contravention of the sewerage undertaker's drainage obligation,⁷⁹ except in the circumstances where the sewerage undertaker fails to comply with the enforcement order.

In the court of first instance, Mr Marcic (claimant) launched a claim on nuisance and breach of his Conventions Rights under Article 8. The Judge found that under the system of priorities then prevailing in the company's area, there was no prospect of any work being carried out in the foreseeable future to prevent flooding of the claimant's property. The Judge concluded that the company (Thames Water) had infringed the claimant's Convention rights.⁸⁰ The decision was affirmed by the Court of Appeal. On a further Appeal by the Company to the House of Lords (now Supreme Court); one of the primary issues for determination before the House of Lords was whether the statutory scheme of the Water Industry Act 1991 as a whole complied with the European Convention.⁸¹ Whilst allowing the Appeal, Lord Nicholls asked:

...More specifically and at the risk of over-simplification, is the statutory scheme unreasonable in its impact on Mr Marcic and other householders whose properties are periodically subjected to sewer flooding?⁸²

The House of Lords made reference to the decision of the European Court of Human Rights in the case of *Hatton v UK*,⁸³ where the 'subsidiary' nature of the Convention was

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Marcic (n 74) 52 [13], where it was stated (Lord Nicholls) that enforcement orders are a means by which the Secretary of State and the Director enforce obligations of a sewerage undertaker (emphasis added).

⁷⁹

Water Industry Act (n 75), s 18 (8). The aforesaid provision limits the availability of other remedies.

⁸⁰

Marcic (n 74) 42.

⁸¹

ibid.

⁸²

ibid 59 [40].

⁸³

emphasised. It was stated that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight, and that a fair balance must be struck between the interests of the individual and of the community as a whole.⁸⁴ As regards the sort of balance struck by the Act, the Lord Nicholls stated:

...The balance struck by the statutory is to impose a general drainage obligation on a sewerage undertaker but to entrust enforcement of this obligation to an independent regulator who has regard to all the interests involved. Decisions of the Director are of course subject to an appropriately penetrating degree of judicial review by the courts.⁸⁵

The House of Lords was of the view that, in principle, the scheme (Water Industry Act) seems to strike a reasonable balance, and that parliament acted well within its bounds as policy makers.⁸⁶ The alleged claim for infringement of Mr Marcic's Convention rights was therefore held to be 'ill-founded,' since the scheme provides a remedy for persons in Mr Marcic's unhappy position, but Mr Marcic chose not to avail himself of this remedy.⁸⁷ In essence, Mr Marcic ignored the scheme (which was held to be convention-compliant) by bringing an action directly on Thames Water without any formal complaint to the Director of Water Resources.

Mr Marcic's case can be contrasted to Guerra's case.⁸⁸ In the latter case of *Guerra v Italy*, the Italian government failed to comply with its obligation under the presidential Decree 178/88 to inform local inhabitants of emergency procedures and the risk of hazards emanating from factories. The European Court of Human Rights (ECtHR) held that the failure to provide such

Hatton (n 69).

84

Marcic (n 74) 60 [41].

85

Marcic (n 74) [42].

86

Marcic (n 74) [43].

87

Marcic (n 74) 61 [46].

88

Guerra v Italy (n 50).

information has led to the damages suffered by the applicants, thereby infringing on their Convention rights as enshrined in Articles 2 and 8. Whilst applying the doctrine of the ‘margin of appreciation’, it can be submitted that the State (Italian government) has overstepped the margin of appreciation by ignoring the tenets of the Decree. But looking at the content of the Presidential Decree, it is obvious that the scheme has created a reasonable balance between the operations of factories and local inhabitants. The only shortcoming in the *Guerra* case was the delay or failure of the government to implement the Directive. In both the *Marcic* and *Guerra* case, parliament had good intentions. The only point of derogation was that in the *Marcic* case, Marcic failed to follow due process as laid down by the Water Industry Act 1991 (as amended), thereby failing to establish his Convention rights. In the *Guerra* case, it was ‘public authority’ who derailed from the laid down directive. The takeaway point in both cases is that public authority (which includes parliament) must act ‘reasonably and appropriately’ in striking a balance which is expected to be compliant with the Convention rights, and most importantly it is shown via case law that a significant nexus does exist between environmental pollution and violation of Conventions rights, so that where the environment is polluted via activities of oil and gas there would be a cause of action in enforcement of Convention rights. To corroborate this stance, Francioni maintained that ‘extensive case law developed by human rights courts and supervisory bodies at regional and universal levels tends to indicate that indeed an environmental dimension of human rights has been recognised’.⁸⁹

2.4 Environmental Challenges in Nigeria

At the heart of this research, is an attempt to unravel the numerous environmental challenges faced by Nigerians, particularly in the oil producing communities in the Niger Delta area, and the need to address such challenges through the instrumentality of fundamental rights actions. In view of this, a brief background showcasing the nature and degree of environmental challenges faced by Nigerians, particularly inhabitants of the oil-rich Niger Delta, is captured in every chapter of the research as a reminder of the need for an argument for a stricter liability⁹⁰ in environmental pollution claims.

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Francesco Francioni, ‘International human rights in an environmental horizon’ (2010) 21 (1) EJIL 43.

⁹⁰

For instance, on a scale of zero to ten (0-10), with 5 being ‘strict liability’ and 10 being ‘absolute liability’, environmental liability under fundamental rights, as argued in the current research should be pinned under 9. With limited space left for illegal activities of ‘third parties’ such as: illegal oil bunkering and acts of

Crude oil in Nigeria was first discovered in commercial quantities in Oloibiri in 1956,⁹¹ a community in the present Bayelsa State. A native of that community, Chief Sunday Inegite, whilst narrating his experience of welcoming the British, German and Dutch engineers in the course of their exploration visits in the community in 1953 said ‘They made us be happy and clap like fools, dance as if we were trained monkeys,’⁹² and Nigeria being one of Africa’s biggest oil producer, it is reported the people of the Niger Delta witness any major development, rather, there are growing reports of environmental degradation as a result of oil and gas activities which has affected wildlife and farming in the area. Chief Sunday Inegite apportioned blame on both the oil transnational corporations and the government. He observed further: ‘I don’t only blame the whites that came here, what about the government? People in government get nearly all the money from the economy’.⁹³

The environmental problems witnessed in the Niger Delta area are well-known, as the Nigerian government in several occasions has corroborated on the plight of the people. In a report furnished by the Nigerian government to the UN Commission on Sustainable Development, it was admitted that:

The environment provides all life support with air, water and land as well as the materials for fulfilling all developmental aspirations of man. As in most other countries of the world, the Nigerian environment today presents a grim litany of woes.⁹⁴

The Nigerian government specifically pointed out that petroleum prospecting with its attendant oil pollution problems has led to environmental degradation such as: loss of

sabotage by vandals.

91

The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC) [3].

92

Andrew Walker, ‘The day oil was discovered in Nigeria’ *BBC News* (Oloibiri, Nigeria, 17 March 2009) <<http://news.bbc.co.uk/1/hi/world/africa/7840310.stm>> accessed July 2 2014.

93

Andrew Walker (n 92).

94

National Environmental Problems, Implementation of Agenda 21: Review of progress made since the United Nations Conference on Environment and Development, 1992. Information provided by the Government of Nigeria to the United Nations Commission on Sustainable Development (Fifth Session, 7-25 April 1997) <<http://www.un.org/esa/earthsummit/nigeriac.htm>> accessed 15 August 2015.

aesthetic values of natural beaches due to oil slicks, damage to marine wildlife, modification of the ecosystem through species elimination, and decrease in fishery resources.⁹⁵ It was admitted that gas flaring has led to problems of ecosystem heat stress, acid rain, destruction of fresh water and forests resources in the coastal areas of the country.⁹⁶

In view of the environmental challenges encountered by the people of the Niger Delta, there had been serious cases of protests and lawsuits with a view to getting government attention and deriving compensations from government and oil transnational corporations. But these moves, in most cases have been witnessed with tremendous resistance from government. Amnesty International, a non-governmental environmental organisation, has equally accused major oil companies, including Shell, of refusing to render a proper disclosure of oil spills in Nigeria.⁹⁷ This trend has been seen to undermine the serious cases of environmental pollution in the Niger Delta area. Ross observed that ‘oil spills are having an appalling environmental impact on the Niger Delta and they are happening at an alarming rate’.⁹⁸ Amnesty is said to have identified about 474 spills in 2012 in an area operated by the Nigerian Agip Oil Company- a subsidiary of ENI.⁹⁹ Although it is reported that all the spills from ENI were recorded to avoid disputes, and the management of the company had alleged to have paid all compensations due to the communities in line with municipal laws.¹⁰⁰

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ibid.

96

ibid.

97

Will Ross, ‘Nigerian oil firms “deflect blame for spills” says Amnesty’ *BBC News* (Africa, 7 November 2013) <<http://www.bbc.co.uk/news/world-africa-24839324>> accessed 14 June 2014.

98

Will Ross (n 97).

99

ibid.

100

Will Ross (n 97).

Environmental campaigners have observed that there are approximately 300 oil spills every year in the Niger Delta.¹⁰¹ These figures are fluctuating, year by year, but the point to note is that records of oil spills are staggering. It is against this background that environmentalists call the Niger Delta the ‘global capital of oil pollution’.¹⁰² On 12 May 2009, Shell’s Bomo Manifold in Nigeria blew up, causing leakage of crude. In May, an Exxon Mobil pipeline in Akwa Ibom State leaked about 300 barrels of crude oil, and this has been described as ‘one of several spills involving the company’.¹⁰³

The Nigerian government is said to have admitted that there were more than 7,000 spills between 1970 and 2000.¹⁰⁴ A native of the Nigerian village of Kpor, Saturday Pirri, a local palm wine tapper in Rivers State of the Niger Delta, whilst narrating personal experience of the effects of oil pollution on the environment observed: ‘It kills our our fish, destroys our skin, spoils our streams, we cannot drink’.¹⁰⁵ In fact, reports of environmental degradation in the Niger Delta caused by oil and gas pollution are unprecedented and inexhaustible to be contained in this brief record. The rationale behind this brief narrative is to awaken minds on the basis behind a series of court actions for environmental justice, which fundamental rights enforcement takes the limelight in this research. As earlier mentioned, the series of environmental abuses have generated protests in the Niger Delta, and in response, protesters are being attacked by government security forces, which *Human Rights Watch* has recorded a series of human rights violations in that regard.¹⁰⁶ Of greater concern of such human rights

101

Caroline Duffield, ‘Nigeria: World oil pollution capital’ *BBC News*, (Niger Delta, 15 June 2010) <<http://www.bbc.co.uk/news/10313107>> accessed 14 June 2014.

102

ibid.

103

Duffield (n 101).

104

ibid.

105

ibid.

106

Human Rights Watch, Nigeria: No Human Rights Progress in the Niger Delta (December 14 2000) <<https://www.hrw.org/news/2000/12/14/nigeria-no-human-rights-progress-niger-delta>> accessed 5 August

violations, is the environmental aspect, because it has been shown that the environmental injustice, and claims of being marginalised in the area had sparked every kind of agitation. Environmental injustice could be considered both a remote and direct cause of key problems faced by the Niger Deltans. The Government of Bayelsa State, a major oil producing State in the Niger Delta, through its governor, Mr. Seriake Dickson observed that:

...Over 260 environmental pollutions are recorded in the state yearly... oil companies have to conform to best practices as done everywhere in the world. They have taken advantage of the weak institutions and laws in the country.¹⁰⁷

In line with the above remark, it is generally believed that the regulatory regime as well as procedural laws on environmental safety is relatively weak. This is a strong assertion which is not taken on face value. Hence, a proper analysis is made with a view to mirroring the environmental legal framework in Nigeria, particularly on environmental rights enforcement throughout the research.

In the light of the above, it is maintained that in view of the principle of ‘state responsibility’, as discussed in chapter 5 of this research, which requires governments to tackle pollution issues within their jurisdictions, and not to cause harm to other states,¹⁰⁸ government must promote issues of public awareness on environmental matters (which entails access to information, public participation in environmental decision-making as well as access to justice) as discussed in chapter 4 of this research.¹⁰⁹ Furthermore, Mr Akenhead of the Technological and Construction Court in London, reasoned in the *Bodo* case that the ‘reasonable steps’ to be taken by oil operators (including the Nigerian government) in protection of pipelines, can, in some cases, be interpreted as including curtailing intentional

2015.

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Valentine Franco, ‘Bayelsa Government decries alarming rate of environmental pollution’ *Daily Post* (Nigeria, August 13 2015) <<http://dailypost.ng/2015/08/13/bayelsa-government-decries-alarming-rate-of-environmental-pollution/>> accessed September 2015.

¹⁰⁸

See discussion in chapter 5 on ‘protection and preservation of the environment and principle of state responsibility. See also the Trail Smelter Arbitration (United States/Canada), (1938) Vol III (Reports of International Arbitral Awards) 1905-1982.

¹⁰⁹

See chapter 4 of the research on ‘issues of public awareness in dealing with environmental challenges’.

acts of sabotage.¹¹⁰ Owing to this, oil operators would be deemed, in some cases not to have taken ‘reasonable steps’ to secure oil facilities if they fail to comply with modern technologies that could safeguard the pipelines and other installations.¹¹¹ It follows that, installation of anti-tampering equipment or other sort of technology to maintain rapid surveillance would amount to reasonable or preventable steps to secure oil facilities and curb oil spills. Most importantly, it is suggested that government should constantly engage oil producing communities in dialogue with a view to addressing grievances relating to issues of marginalisation and underdevelopment as mentioned in figure 3.3.1 of this research.

2.5 Awareness of Fundamental Rights as a Tool for Environmental Protection in Nigeria

Looking at case law and statutory provisions within the field of human rights as it relates to environmental protection, it could be said that this area of study is novel with minimal attention given by government. This is because there had been no clear enforcement provision relating to the right to a clean environment until the incorporation of the African Charter on Human and People’s Right¹¹² into the municipal laws of Nigeria in 1983. It is against this background that Anaebo and Ekhator observed that:

There has been never-ending debate concerning the right to a healthy environment and the extent to which the law has provided for or guaranteed the right in national and international contexts. Whilst some countries have expressly recognised the right to a healthy environment in their constitutions and subsidiary laws, others have relied on regional instruments and treaties to guarantee such rights, especially where domestic legislation is either lacking, inadequate or ineffective.¹¹³

Although section 20 of the Nigerian Constitution emphasises on the need for the Federal government to protect and improve the environment and safeguard the water, air and land,

¹¹⁰

The Bodo case (n 91) [93].

¹¹¹

The Bodo case (n 91) [92] (g).

¹¹²

African Charter on Human and People’s Right (Ratification and Enforcement) Act Cap A9 vol 1, LFN 2004. It was formerly Cap 10 LFN 1990.

¹¹³

Onyeka K Anaebo and Eghosa O Ekhator, ‘Realising substantive rights to healthy environment in Nigeria: a case for constitutionalisation’ (2015) ELR 17(2) 82.

forest and wild life of Nigeria,¹¹⁴ this provision is non-justiciable by virtue of section 6(6)(c) of the Constitution, as the former provision on the duty of government to maintain a safe environment falls within the Fundamental Objectives and Directive Principles of State Policy, which is precatory in nature. However, considering the growing body of legal knowledge and awareness that the rights to life, dignity of the human person and private and family life would inevitably be interpreted to include environmental rights, victims of environmental pollution and academics effectively contributed to project a cause of action under fundamental rights enforcement proceeding in Nigeria where the environment is polluted by oil and gas activities of transnational corporations and local industries as well. In view of this, Jonathan had observed that:

...Indeed, an environment degraded by pollution and defaced by the destruction of all beauty...is as contrary to the satisfactory living conditions and the development of personality, as the breakdown of the fundamental ecological equilibrium is harmful to physical and moral health. There is, of course, an integral link between the right to a healthy environment and other human rights in general. The deterioration of the environment affects the rights to life, health, work, dignity of human person, privacy of the home, education among other rights.¹¹⁵

The above remark lends support to the foundation and justification for the pursuit of environmental justice under fundamental rights proceedings in Nigeria, particularly where the right to a clean environment is not explicit within legal instruments guaranteeing the aforementioned fundamental rights. It is logically and inductively reasoned that a man's survival solely depends on a harmless and productive biological ecosystem, and every other human right would go into oblivion if man ceases to exist; in view of this, it should be the case that once the concept of *fundamental rights* is mentioned or conceived (particularly the rights to life, dignity of the person and private and family life), it should legally be interpreted to including the right to a safe environment as it is shown from the series of judicial pronouncements considered above on the European Convention of Human Rights and the various conventions and world treaties mentioned in this research. This position is not

¹¹⁴

Constitution of the Federal Republic of Nigeria 1999 (as amended), s 20.

¹¹⁵

Ehusani A Jonathan, 'Fundamental Human Right to Healthy Environment (a case for justiciability)' (2011) Human Rights Review- An International Human Rights Journal-An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, and the National Human Rights Commission of Nigeria 2(2) July p158.

unchallengeable, as it could be maintained that Parliament never envisaged a right to a clean environment to be absorbed within the aforementioned rights. But such an argument or standpoint may not be persuasive enough to deny environmental rights within the legal connotations and circumstances of the rights to life, dignity of human person and private and family life.

With regard to judicial pronouncement, a Federal High Court in Nigeria in the case of *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd and others*,¹¹⁶ has affirmed the position of the applicants that the pollution of the environment via gas flaring by the first respondent (SPDC) was a violation of their fundamental rights to life and dignity of the human person as guaranteed by sections 33(1) and 34(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and related provisions of the African Charter¹¹⁷. This judgment should be regarded as a landmark decision and a far-reaching judicial pronouncement linking incidents of oil and gas pollution to violation of the aforementioned guaranteed rights provided for in Chapter IV of the Nigerian Constitution. To avoid repetitions, the full detail of the verdict is reserved for the discussion in Chapter 6 to aid the argument for an absolute liability for environmental rights enforcement.

Ruth and Chinewubeze have expressed worries and shortcomings relating to the *Gbemre* case, pointing out that the judgment is only persuasive on the ground that the Federal High Court is a Court of coordinate jurisdiction with other high courts of the states on the subject matter.¹¹⁸ They maintained that the ‘jurisprudential value’ of the decision would have had more credence or weight if it were a judgment of the Court of Appeal or the Supreme Court.¹¹⁹ This position is quite correct, but it is necessary to add that there is a presumption of correctness, validity and bindingness on the parties to the *Jonah Gbemre* case until it is

¹¹⁶

[2005] AHRLR 151 (Federal High Court of Nigeria, Benin judicial division).

¹¹⁷

African Charter (n 107).

¹¹⁸

Ruth and Chinewubeze (n 34) 216.

¹¹⁹

Ruth and Chinewubeze (n 34) 216.

upturned on appeal. It would be pertinent to state that as at the 4th of April, 2016, when an application to search the case file of the aforementioned case (*Jonah Gbemre v SPDC*) was put forward before the Assistant Director Litigation at the Federal High Court (Benin Division), it was confirmed that there is no pending appeal on the courts' verdict, meanwhile the judgment was delivered in 2005.

It is noteworthy that before the pronouncement of the ground-breaking judgment in the *Jonah Gbemre* case in 2005, environmental law experts have had mixed opinions on whether there is any cause of action in enforcement of fundamental rights to a clean environment in Nigeria. Atsegbua had made reference to Okukpon and Adewale on their respective stance that even if it is assumed that the provision in section 20 of the Nigerian Constitution making provision for the need for States to maintain a healthy environment is not justiciable, section 33(1) which borders on the right to life appears to protect the citizens against environmental degradation; affirming that the right to life means the right to a clean environment.¹²⁰ Conversely, Okon observed that 'neither the 1999 Constitution nor any enactment on environment is capable of creating fundamental right to a clean and healthy environment in favour of any person whether natural or artificial.'¹²¹ Nonetheless, Okon seems to theoretically admit an existing nexus between the constitutional right to life and the right to safe environment when he said 'definitely, the inter-relationship between a balanced, clean and healthy environment and the right to life will see the enforcement of the environmental objectives through the right to life'.¹²²

Following notions that the Nigerian Constitution does not contain an enforceable provision on the right to a safe environment, some legal experts have recommended that section 20 of the Nigerian Constitution be amended to project the right to a clean environment which is to be captured under Chapter IV of the Constitution (containing fundamental rights), and according to Atsegbua (in an article published in 2001), if this is done, the right to a clean

¹²⁰

Atsegbua (n 11) 90.

¹²¹

Emmanuel E Okon, 'The environmental perspective in the 1999 Nigerian Constitution' (2003) 5 (4) *Env L Rev* 256, 271.

¹²²

ibid.

environment would be justiciable.¹²³ This literally suggests that before the judgment of the *Jonah Gbemre* case¹²⁴ (in 2005) a vast majority of environmental law experts were not satisfied or confident with the willingness of the Nigerian courts to expansively interpret the existing constitutional provisions of the rights to life, dignity of human person and private and family life to reflect environmental rights. But even if there are still prevailing fears on the readiness of the courts to give more expansive interpretation to the constitutionally guaranteed rights in Chapter IV to include environmental rights, particularly due to the fact that the judgment of the *Jonah Gbemre* case is still subject to further appeals in the Court of Appeal and Supreme Court as expressed by Ruth and Chinewubeze above,¹²⁵ it is observed from recent legal literature, after the aforesaid judgment that the arguments in support of enforcement of environmental rights derived from the above mentioned constitutional rights have incredibly improved amongst writers from 2005 till date.

At the international level, the United Nations Human Rights Committee rightly cautioned that the right to life as contained in the International Covenant on Civil and Political Rights, should not be interpreted narrowly,¹²⁶ noting further that ‘the expression “inherent right to life” cannot properly be understood in a restrictive manner’.¹²⁷

With regard to the position of the Court in the *Jonah Gbemre* case, and without being in haste to pre-empt the outcome of an appeal (in the aforesaid case or similar ones that would likely emerge in future), it would be difficult to reason or hold that a decision embedding or subsuming the rights to life, dignity of the human person and private and family life into the right to a healthy or safe environment amounts to a decision reached *per incuriam* or

¹²³

Atsegbua (n 11) 90.

¹²⁴

Jonah Gbemre (n 111). This case remains the locus classicus on the link between environmental pollution and fundamental rights violation in Nigeria.

¹²⁵

Ruth and Chinewubeze (n 34) 216.

¹²⁶

UN Human Rights Committee, General Assembly Comment No. 6: Article 6 (Right to life) UN Doc HRI/GEN/1/Rev 1 at 6 (1994) para 1.

¹²⁷

ibid para 5.

ignorantium, bearing in mind the contemporary conventional trends in this aspect of the law. This is because the existing links between the aforesaid rights and incidents of environmental pollution are genuine and practically interwoven to be turned down. This is not to rule out the possibility of turning down such judgments on technical grounds. For example, in *Okpara v Shell Petroleum Development Company Nigeria Ltd and Ors*,¹²⁸ an action on fundamental rights enforcement in another Federal High Court which is similar to that of *Jonah Gbemre* above was struck out on the grounds that the applicant cannot institute the action in a representative capacity, and secondly on the grounds of wrong joinder of cause of action.

With regard to the latter case, the technical issue of applicant(s) not being able to institute in a representative capacity in fundamental rights enforcement has been adjusted by the recent Fundamental Rights (Enforcement Procedure) Rules,¹²⁹ recognising an ‘Applicant’ as a party who files an application or on whose behalf an application is filed under the rules.¹³⁰ This is without any need for applying for a leave of court as against the former rules of 1979 which abhors the receipt of an application for an order enforcing or securing the enforcement of any fundamental rights contained in the Constitution without being granted leave by the court.¹³¹ Again the new Fundamental Rights (Enforcement Procedure) Rules of 2009 have totally expunged any form of limitation of action imposed by any limitation statute whatsoever.¹³² It is pertinent to mention that in the former rules of 1979, no leave is granted for an application except such application is brought within twelve months from the date of the happening of

¹²⁸

Suit No. FHC/PH/CS/518/2005, Unreported decision of the Federal High Court, Port Harcourt Division 29 September 2006.

¹²⁹

Fundamental Rights (Enforcement Procedure) Rules 2009. These rules are made by the Chief Justice of Nigeria in exercise of the powers conferred on that office by section 46(3) of the Nigerian Constitution to guide proceedings emanating from Chapter IV (Fundamental rights).

¹³⁰

ibid, see Interpretation section of the Rules in Ord I, r 2.

¹³¹

FREP Rules 1979.

¹³²

FREP Rules 2009 (n 124), Ord III, r 1.

the event, matter or act complained, except where such delay is satisfactorily justified.¹³³ It is submitted that the current rules have immensely reduced the level of exercise of jurisdictional discretion by judges on the fate of applicants in environmental rights enforcement, bearing in mind that judges are most likely to be influenced by their orientations and beliefs in granting leaves and other related matters, particularly in controversial areas of law as human rights and environmental justice.

The Nigerian courts seemed to have shown remarkable interest in fundamental rights enforcement in such a manner that stood beyond the limitations imposed by the old rules of enforcement.¹³⁴ Justice Fatayi-Williams, a former chief justice of Nigeria whilst affirming on the imperativeness of fundamental rights as contained in the Nigerian Constitution of 1979 maintained that:

...I take the view that because it is so fundamental to the life, liberty and well-being of the individual, any person who complains about an alleged infringement of any of his Fundamental Rights as entrenched in our Constitution, to convey the issue of such infringement at any stage of any court proceedings whether in the trial or Court of Appeal.¹³⁵

Justice Aderemi, in a public lecture, whilst making reference and throwing support to the above dictum of Fatayi-Williams, on the importance of fundamental rights observed as follows:

... I beg to submit that by their nature, they are not a creation of the constitution. It therefore seems to me that they are entrenched in the constitution because they are fundamental and they can never be said to be fundamental because of the reason of their being entrenched in the constitution. They are the basic natural rights of all mankind- they may even be described as the fundamental divine rights, given to mankind from time immemorial.¹³⁶

¹³³

FREP Rules 1979, Ord II, r 1.

¹³⁴

FREP Rules 1979.

¹³⁵

Sofekun v Akinyemi and others [1980] 5-7 SC 1, 20-21.

¹³⁶

Pius O Aderemi, 'Nigerian Courts and the Enforcement of Fundamental Rights' (being a memorial lecture delivered on 12th May, 2010 in honour of Hon Justice Idigbe at University of Benin, Nigeria)

Justice Aderemi clearly pointed out that his position is not without exception.¹³⁷ It is interesting to note that the above standpoint has been given adequate attention fit for this research, and no doubt, it has raised a series of arguments amongst ancient scholars and academics. Whilst recognising the need to avoid clumsy repetition, it is necessary to point out that these rights (fundamental rights) gain enforceability by virtue of being encoded in municipal Constitutions as affirmed by Nasir JCA in *Uzoukwu & Ors v Ezeonu II & Ors*.¹³⁸ It would be plausible to submit that Fundamental Rights are equally captured in other statutory provisions or legal instruments, for the weight they gain, depends largely on the recognition conferred by the judicial system. This position is justified, first, in the Preamble to the Fundamental Rights Enforcement Procedure Rules 2009. It provides that the overriding objective of the Rules includes ‘the Constitution, especially Chapter IV, as well as the African Charter’ and that the provisions therein be ‘expansively and purposely interpreted and applied’.¹³⁹ Furthermore, if the Rules must be read and applied from its explicit provisions, then, a cause of action, under Fundamental Rights Enforcement within the ambit of the Rules, arise where provisions of the Constitution in Chapter IV or the African Charter has been, is being, is likely to be infringed.¹⁴⁰

In the light of the above, there is little doubt that the provisions of the African Charter can best be considered as ‘fundamental rights’, since the Fundamental Rights Enforcement Procedure Rules are a direct creation of section 46(3) of Chapter IV of the Nigerian Constitution. In fact, the term ‘fundamental right’ is defined under the Rules as follows:

Fundamental Right means any of the rights provided for in chapter IV of the Constitution, and includes any of the rights stipulated in the African

<<http://nigerianlawguru.com/articles/human%20rights%20law/NIGERIAN%20COURTS%20AND%20THE%20ENFORCEMENT%20OF%20FUNDAMENTAL%20RIGHTS.pdf>> accessed 13 July 2015.

137

ibid.

138

[1991] 6 NWLR (Pt 200) 708 at 761 (Per Nasir JCA).

139

FREP Rules 2009 (n 124), para 3(a) of preamble.

140

FREP Rules 2009 (n 124), Ord II, r 1.

Charter on Human and Peoples' Rights (Ratification and Enforcement Act). Human Rights includes fundamental rights.¹⁴¹

From the aforesaid provision, it could be observed that the conundrum in the use of the phrases, 'fundamental rights' and 'human rights' is arguably resolved. Contrary to Order 1 Rule 2 above (text to n 136) ascribing the provisions of the African Charter as fundamental rights, Okon had submitted that the decisions of the Supreme Court of Nigeria in *Attorney General of Ondo State v Attorney General of the Federation and Ors*,¹⁴² and *Attorney General of Lagos State v Attorney General of the Federation and 35 Ors*,¹⁴³ affirming the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy contained in Chapter II, which contain the only direct provisions on the protection of the environment, clearly implies that 'any new enactment on environment by the National Assembly or existing Federal Government legislation on environment has the status of an ordinary law and can only create ordinary rights'.¹⁴⁴ Okon's latter stance is suggestive that the African Charter, which is now adopted by the National Assembly as a domestic law can only create ordinary rights but not fundamental rights. This reasoning may be considered fallacious owing to Order 1 Rule 2 of the FREP Rules 2009 above (see text to n 136) and the judgment of the *Jonah Gbemre* case upholding the fundamental nature of the provisions of the African Charter vis-à-vis environmental protection and preservation.

Whilst it is clear that Fundamental Rights are enforceable rights, not all Human Rights are enforceable, only that the term is used generally to refer to both enforceable and unenforceable rights. Hence it is maintained that 'human rights include fundamental rights'.

In the course of this research, references have been made to regional and international instruments bordering on environmental rights. These instruments, despite their precatory nature are relevant and persuasive in proceedings relating to environmental rights

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FREP Rules 2009 (n 124) Ord I, r 2.

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[2002] FWLR (Pt 3) 1972.

¹⁴³

[2003] MJSC 1.

¹⁴⁴

Okon (n 121) 271.

enforcement in Nigeria. It is stated in the Fundamental Rights Enforcement Procedure Rules that:

... For the purpose of advancing but not never for the purpose of restricting the applicant's rights and freedoms, the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware, whether these bills constitute instruments in themselves or form parts of larger documents like constitutions.¹⁴⁵

It is shown that international treaties and conventions, as well as regional instruments, particularly in Africa, promoting the rights to a safe environment would promote the need for Nigerian Courts to give and maintain an expansive interpretation of the Constitutional rights to life and dignity of the human person rather than restricting or limiting such provisions. This is necessary, owing to the increasing reports of environmental pollution caused by oil and gas activities, which are seen to infringe on basic rights.

A cumulative understanding of *Fatayi-Williams* in *Sofekun*¹⁴⁶ and justice Aderemi's observations above, suggests that claimants in cases commenced under the torts of nuisance, negligence and under the strict liability rule as discussed in chapter 1 would be at liberty to invoke constitutional and statutory provisions bordering on fundamental rights in such traditional claims for compensations without necessarily utilising the procedures laid under the Fundamental Rights Enforcement Procedure Rules, and such issues bordering on fundamental rights will be given preferential treatment and accelerated hearing above others. In addition, it is submitted that the enforcement of fundamental rights under the Constitution is not necessarily hinged upon the making of Rules by the Chief Justice of Nigeria. It is encouraging that a cause of action arising in areas of environmental rights violation as adequately discussed in chapter 6 be pursued via Fundamental Rights Enforcement Proceedings by virtue of the numerous benefits attached to it, which includes the expediency in obtaining judgment and the need for the court to adequately address prevailing issues.

2.6 Conclusions

This chapter has analysed the use of fundamental rights as a vehicle for environmental protection. This is done in line with one of the aims of this research; which is to determine

¹⁴⁵

FREP Rules 2009 (n 124), para 3(b) of preamble.

¹⁴⁶

Sofekun v Akinyemi and Others (n 135).

whether the doctrine of absolute liability can be applied to constitutional rights relating to a safe environment. This chapter established a nexus between ‘human rights’ and ‘natural law’ principles, with the premise that neither of the concepts is enforceable in legal jurisprudence. It is observed that natural law principles were given much importance (and in most cases, enforceable) in ancient times, hence, the reason for most ancient philosophers to anchor their theories on the principle. Contemporary legal systems could no longer leave serious issues as fundamental rights to life and dignity of human person to natural law principles or as mere human rights pursuits. This engendered governments to develop special codes for such enhanced rights. At the European level, the European Convention on Human Rights and Fundamental Freedoms and its subsequent protocols are evident. At a municipal level in the English Jurisdiction, the Human Rights Act had captured these rights. The same is applicable in Nigeria, as shown in the Nigerian Constitution and the absorption of the African Charter into municipal law; although this is given greater consideration in chapter 6.

Thus, in English practice, issues of fundamental rights relating to right to life and respect of private life and home, are approached with the doctrine of the ‘margin of appreciation’ which requires that public authority could interfere with these rights only when acting in needs of a democratic society, which entails ‘economic well-being of the country’ and a few other circumstances as mentioned in Article 8 of the ECHR.¹⁴⁷ In addition to striking a balance between the individual and national interest, the English House of Lords in *Marcic v Thames Water Utilities Ltd*¹⁴⁸ has mentioned that the courts will consider whether the action(s) of the State said to have infringed on the fundamental rights of the individual is ‘reasonable and appropriate’. In view of this, it is maintained that the measure of liability as regards issues of fundamental rights violations on the rights to a safe environment could best fit with common law doctrines of strict liability, nuisance or negligence as the case may be, rather than a case for absolute liability, due to the numerous defences public authorities are likely to raise. Notwithstanding, human rights actions can be seen as a tool for environmental protection.

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European Convention on Human Rights and Fundamental Freedoms 1950; see Article 8 (1) and (2) on the right to respect for private and family life, home and correspondence. Other circumstances under which these rights can be violated by the state are on grounds of national security, public safety, prevention of crime, protection of health or morals, and the protection of freedoms and rights of others.

¹⁴⁸

[2003] UKHL 66, [2004] 2 AC 42.

In Nigeria, environmental challenges relating to oil and gas pollution, particularly in the Niger Delta, are briefly considered. It is shown that a pollution-free environment is inevitable and necessary for healthy living; and where the ecosystem is fraught with incidents of environmental pollution as the case in the Niger Delta, it is certain that lives of inhabitants are threatened. In view of this, it is argued that there is a cause of action for violations of fundamental rights to life and dignity of human person as well as the right to private and family life. Although, these rights are not clearly explained to include environmental rights in the Nigerian Constitution, they can be expansively interpreted to include environmental rights. Furthermore, the African Charter has captured the right to a safe environment, and by virtue of the Fundamental Rights Enforcement Procedure Rules 2009, the provisions of the African Charter are considered as fundamental.

In the next two chapters, the key issues and challenges encountered in the course of environmental rights enforcement are critically analysed. The next chapter, in particular, utilised a legal theory (economic theory) in explaining government (executive, legislative and judicial) actions and responses in relation to liability of oil TNCs, and the reasons behind such actions or demeanour, particularly on the reluctance of government to directly uphold fundamental rights to a pollution-free environment in the Nigerian Constitution. This is done with a view to aiding a practical understanding of the benefits of fundamental rights approach to environmental protection and preservation, and some of its shortcomings on the part of TNCs.

CHAPTER 3

A CRITICAL ANALYSIS OF THE ISSUES AND CHALLENGES IN ENVIRONMENTAL RIGHTS ENFORCEMENT IN NIGERIA

3.1 Introduction

This chapter focuses on some of the numerous challenges encountered by victims of environmental pollution (particularly caused by oil and gas) in enforcing their fundamental rights to a safe environment; justifying some of the significant barriers to effective justice through legal theories and jurisprudence. It is shown that whilst principles of tortious liability in nuisance, negligence and strict liability (as in *Rylands v Fletcher*) easily form subject matters and issues for determination in environmental pollution litigation, commencing judicial actions through fundamental rights enforcement is rare, and most States, including Nigeria, and even in developed countries are reluctant in pushing for such fundamental rights enforcement in environmental pollution cases (these rights are deemed to be absolute). At the forefront of these barriers is the economic factor which seems to influence the behaviour or disposition of judges in being lenient or more likely to favour states and Transnational Corporations (TNCs). The economic reason is predicated and explained on the basis that TNCs are engaged in activities that are presumably profitable to the state, thereby boosting the economic well-being of the State, and applying strict principles of liability in incidents of environmental pollution would expose TNCs to a series of litigations and compensations claims which would adversely affect the profits of the state. Maintaining almost a similar stance, Atsegbua had observed that if the fundamental right to a clean environment is directly inculcated in the 1999 Constitution of Nigeria, and becomes enforceable:

The neglected oil communities of the Niger Delta will begin to assert their constitutional rights. It is however doubtful that government or legislature will be willing to undertake such a bold step. The government may feel that such a step will expose it to litigation by the oil-producing communities of the Niger Delta.¹

Hence, it can be argued that dispensing justice in a manner that will permit smooth running of activities of Oil TNCs may not necessarily reflect a compromised judiciary but can be seen as a judicial backing to government interests on economic grounds, this is because oil and gas

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Lawrence Atsegbua, 'Environmental rights, pipeline vandalisation and conflict resolution in Nigeria' (2001) 5 IELTR 89, 90.

activities of TNCs are seen as the economic mainstay of the nation. Conversely, it is submitted that creating a balance between individual rights infringements and the interest of the state's economy would be a clear attempt to undermine fundamental rights of individuals due to profit-making or national economy. However, it is shown that judges retain substantial discretion, via case law to make decisions that would affect government policies as well as expand the frontiers of the law.

Albeit there may not be a generally known or acceptable doctrine to explain the reasons for judicial reluctance in holding oil TNCs absolutely liable in oil and gas pollution, particularly in the area of fundamental rights enforcement to a healthy environment in Nigeria, the doctrine of the *Margin of Appreciation* or *balancing of interests* as first expounded by the European Court of Human Rights (ECtHR)² and later emphasised in the case of *Marcic v Thames Water Utilities Ltd*³ in the UK, which takes cognisance in balancing the economic interest of the state and that of individuals in claims for environmental pollution relating to Convention rights, is a clear demonstration of an aspect of the *Economic theory* as discussed in this chapter. It is submitted that although the nomenclature may vary, the *margin of appreciation* is a universal concept which appears to undermine and stand as a barrier to fundamental rights enforcement vis-à-vis the right to a clean environment which is considered an absolute right. Conversely, it could be argued that since oil and gas sales are Nigeria's largest revenue stream, environmental pollution from activities of oil TNCs, which is an inevitable consequence of oil and gas exploration and production ought to attract little or no penalty since their (TNCs) engagements are for the interest of the community.

In the context of this research, judicial technicalities and the lack of enforcement of extant laws on environmental pollution are identified as hurdles to attainment of environmental justice within the parameters of fundamental rights enforcement, bearing in mind allegations of irresponsible behaviours from transnational corporations engaged in oil and gas extraction

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See *Powell and Rayner v UK* (1990) 12 EHRR 355, [1990] ECHR 931/81.

3

[2003] UKHL 66, [2004] 2 AC 42.

which has attracted civil agitations in recent past,⁴ and has added to the numerous environmental challenges in oil producing regions in Nigeria.

Furthermore, consideration is given to issues of public awareness in environmental matters. It is observed that the lack of public awareness in environmental matters is seriously hindering the enforcement of fundamental rights relating to the environment. Due to the intricate nature of this latter challenge, a complete chapter is dedicated to it; analysing the importance of access to environmental information, public participation in environmental decision-making as well as access to environmental justice.

3.2 Jonah Gbemre v SPDC⁵: A Reflection of Judicial Legislation

Whilst the current chapter is not disposed to discussing the practicability of case-law or judicial precedence in detail, the primary target is to showcase that judges can competently reform the law when faced with issues involving questions of policy, whether political or social in nature; and such reforms are basically anchored on issues of national interest, personal disposition of the judge and other related factors. Consequently, case law (being a primary source of the law) remains useful in the Nigerian and English legal systems, and case law analysis becomes imperative due to the need for the judiciary to creatively and expansively interpret certain provisions of the law to meet with prevailing global trends or peculiar challenges in domestic jurisdictions which are yet to be given comprehensive legislative backings; and in this context, focus is on the interpretation of existing laws to give effect to fundamental right to a clean environment.

With regard to the role of the court to make significant contributions to the body of the law via case law (otherwise known as judicial legislation), Denning LJ observed in the case of *Magor and St Mellons Rural District Council v Newport Corporation*,⁶ that:

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Evaristus Oshionebo, 'Transnational Corporations, civil society organisations and social accountability in Nigeria's oil and gas industry' (2007) 15 AJICL 107.

5

[2005] AHRLR 151 (Federal High Court of Nigeria, Benin Judicial Division).

6

[1950] 2 All ER 1226 (CA).

We sit here to find out the intention of parliament and ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.⁷

Whilst the expression was partially admitted, Lord Simonds had expressed misgivings on Denning's position when the same case (the *Magor* case) came on Appeal to the House of Lords (now Supreme Court). Lord Simonds had maintained that:

It is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament- and not only of Parliament but of Ministers also- cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.⁸

The above expression suggests that even if statutory provisions are ambiguous, there is a limit to which judges will not go. Lord Simonds's view seems pretty clear but a bit perplexing regarding the role judges should play where provisions of the law are not clear or comprehensive, since the limit at which judges should go in the course of interpretation is not clearly stated or may not be gauged. He criticised the proposition that 'what the legislature has not written, the court must write'.⁹ Nonetheless, Lord Simonds had advanced a traditional view to resolving ambiguous provisions of legal instruments when he said that the above view by Denning LJ '...appears to...be a naked usurpation of the legislative function under the thin disguise of interpretation...if a gap is disclosed, the remedy lies in an amending Act'.¹⁰

It is submitted that Lord Simonds's remedy of filling gaps of ambiguous legal instruments by waiting for the legislature to make amendments may not be too practical when judges are faced with pressing issues for determination in the face of ambiguity. Whilst the suggestion is tenable and constructive, and equally in line with principles of separation of powers, a

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Magor (n 6) 1236.

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Magor and St Mellons Rural District Council v Newport Corporation [1951] AC 189, 191(HL).

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ibid 191. See also *Seaford Court Estates Ltd v Asher* [1949] 2 All ER 155.

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Magor and St Mellons (n 8) 191 (HL).

suggestion for interim measures which the court must take to interpret ambiguous provisions would be useful. Albeit Lord Simonds had highlighted that his area of concern is on the approach of what amounts to construction of modern statutes, he had admitted that ‘it is after all a trite saying that on questions of construction different minds may come to different conclusions.’¹¹ In essence, Denning’s position is worthy of support and Lord Simonds’s caution is instructive. In cases where construction of legal instrument is needed or in cases where there is higher need or susceptibility for judicial discretion, particularly where there are gaps in statutes, Raz has recommended that judges should rely on their moral judgment.¹² This latter position appears to be in tandem with current trends with regards to judicial legislation. In the same vein, a foremost legal positivist, inclined to the concept of judicial law-making, HLA Hart observed that:

In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.¹³

The above remark (text to n 13), and the foregoing discussion on the role of judges on questions of construction form the basis or justification for the judgment of the Federal High Court in Nigeria in the case of *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd and others*.¹⁴

Despite the absence of a clear provision on the right to a clean and pollution-free environment in the Nigerian Constitution embodying fundamental rights, there has been a global call, and some isolated judicial interpretations recognising the right to a safe environment as a fundamental right. Steve Foster has rightly observed that certain rights and

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ibid 189.

¹²

Joseph Raz, *The Authority of Law* (Clarendon 1979) 199.

¹³

HLA Hart, *The Concept of Law* (2nd edn, OUP 1997) 136.

¹⁴

[2005] AHRLR 151 (Federal High Court of Nigeria, Benin judicial division).

claims are considered as ‘fundamental’ because of the enhanced status they are given over and above other claims.¹⁵ Amnesty International observed that ‘human rights monitoring bodies, and international courts, are increasingly recognizing poor environmental quality as a causal factor in violations of human rights.’¹⁶ In chapter 2 of this research, the concept of fundamental rights (or human rights, as the case may be) as a tool for environmental protection was aptly discussed, it has been showcased that many jurisdictions have arbitrarily interpreted human rights claims to the environment with cognisance to social and political realities, thereby rendering it as an amorphous concept or creating doubts as to the nature of liability obtainable in human rights claims to environmental pollution incidents. Nonetheless, at the international level there are a series of Conventions and Treaties upholding the fact that environmental pollution could unavoidably infringe on basic rights of citizens. Justice Weeramantry of the International Court of Justice has pointed out that:

The protection of the environment is...a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to evaluate this, as damage to the environment can impair all the human rights spoken of in the Universal Declaration and other human rights instruments.¹⁷

Justice Weeramantry’s view, in practical terms is incontrovertible. But nevertheless, it is imperative to bear in mind the gap that exists between what the law of a country ‘is’ and what the law ‘ought’ to be. Whilst it is observed that environmental pollution would indisputably instigate clear violation of fundamental rights of citizens, this has not been trite and absolute in most jurisdictions. In essence, there has been a remarkable burden on victims of environmental pollution to establish the necessary link between fundamental rights and environmental pollution in courts, and where such link is established, the probability of establishing liability against government authorities is remarkably thin owing to prevailing circumstances that would have led to such pollution incidents, particularly, economic factors.

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Steve Foster, *Human Rights and Civil Liberties* (Pearson 2003) 8.

¹⁶

Amnesty International Publications, *PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA* (2009) 12.

¹⁷

Hungary v Slovakia [1997] ICJ Separate opinion of vice-President Weeramantry, 91-92.
<<http://www.icj-cij.org/docket/files/92/7383.pdf>> accessed 25 August 2015.

In Nigeria, the *Jonah Gbemre* case is currently the only known ‘reported’ case where the court (The Federal High Court) took the step to affirm that constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Nigerian Constitution respectively, and reinforced under Articles 4, 16 and 24 of the African Charter,¹⁸ inevitably includes the right to a clean poison-free, pollution-free and healthy environment. From the provisions of international treaties and conventions mentioned in this research (particularly the European Convention on Human Rights and Fundamental Freedoms 1950) echoing the nexus between environmental pollution and fundamental rights infringement, the rationale for affirming violation of fundamental rights in the Nigerian Constitution, in cases of environmental pollution is not far-fetched. The rights to life and dignity of human person are conventionally hinged on a safe environment. What the Federal High Court has done in the *Jonah Gbemre* case is a clear attestation to the concept of *judicial legislation* by giving a wider interpretation to the rights to life and dignity of the human person; and in practical terms, this is a major role of the judiciary as a law reformer.

It is widely held that obtaining ecological justice in civil court proceedings against oil TNCs appears to be difficult for victims of environmental pollution in Nigeria.¹⁹ It is true that on questions of construction of legal instruments different minds may come to different conclusions,²⁰ but it should be borne in mind that every government would be inclined to create an enabling environment for its investors and it is a hard fact that a strict environmental legal framework or judicial stance on liability could be distractive to oil and gas investors owing to the fact that environmental pollution is somewhat inevitable in the course of exploration and production of oil and gas. In this vein, it would not be difficult to pinpoint a few theories underpinning governments’ reluctance in promoting environmental rights.

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African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act Cap A9 LFN 2004.

¹⁹

Tineke Lambooy and Marie-Eve Rancourt, ‘Shell in Nigeria: From Human Rights to Corporate Social Responsibility’ (2008) 2 Hum Rights and Int’l Legal Discourse 241.

²⁰

Magor and St Mellons case (n 8) (HL) (Lord Simonds).

3.3 A Critical Analysis of the Hurdles in the Enforcement of Environmental Rights

Carstensen maintained that there are several reasons why expressly stating economic or other theories of a legal rule, a doctrine, or a case is a worthy project.²¹ He confirmed that though some legal scholars seem not to appreciate the importance of theory in explaining legal rules, therefore they deny or ignore the theory or theories they employ, and that this is bound to frustrate scholarly and practical understanding of law.²² Carstensen's position forms the rationale for the discussion under the current section owing to the fact that most government policies and judicial decisions are leveraged by existing legal theories, consciously or not, and linking such theories to judicial verdicts or government policies will further expatiate and advance a better understanding of the current position of the law and the challenges bedevilling it, particularly in the area of fundamental rights and environmental law.

Furthermore, Carstensen had specifically identified some importance of utilising legal theory or theories in explaining legal doctrines or rules. First, it can facilitate the prediction of outcomes. Second, theory can aid to the identification of the results, processes, and implications of the pursuit of certain legal goals, by identifying and articulating directly on the goals. Third, theory can identify goals, and define ways to achieve them or at least explain how law aids or hinders their achievement. Fourth, theory can help evaluate the cost to goals ignored in single-minded pursuit of other goals. Fifth, specific theory is amenable to testing, validation, and critique in a way that loose generalisations and ad hoc conclusions are not. Finally, theory can instruct lawyers at a very practical level in the sorts of arguments and evidence that will make particular claims more or less persuasive.²³ This theory is deployed in the current research to examine the disposition of the Nigerian government; including the courts on the economic factors acting as barriers to environmental justice.

What this current research seeks to resolve is whether an action under fundamental rights violations in event of environmental pollution can generate an absolute liability (as compared to that of the strict liability rule and other common law torts such as nuisance and negligence

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Peter C Carstensen, 'Explaining Tort Law: The Economic Theory of Landes and Posner' (1987-1988) 86 Michigan Law Review 1161.

²²

ibid.

²³

Carstensen (n 21) 1162.

as discussed in chapter 1) on the polluter without any extraneous consideration of ‘economic well-being of the State’. Notwithstanding, it could be said that principles of compensation with regards damages for injuries suffered by claimants are mostly guided by legislation, and where there is a gap in the law, judges would exercise their discretionary jurisdictions as to remedying damages.

3.3.1 Economic Well-Being of the State: An Obstacle to Enforcement of Fundamental Rights to a Safe Environment?

The economic theory of law is multi-faceted and complex. It is submitted that the key reason for the reluctance of some governments, particularly in developing states to inculcate fundamental rights to a pollution-free environment in the Constitution (the grundnorm), vis-à-vis activities of oil and gas is the fact that oil transnational corporations have been a major source of the economic live stream of these nations and to open the door for fundamental rights enforcement in environmental matters is to open a flood gate of arbitrary and a plethora of judicial cases against TNCs, and if this is allowed, there is the tendency of victims obtaining a series of injunctions and compensations, thereby obstructing the profits and activities of these companies. Ejims observed in this regard that petroleum contracts are being entered into in Nigeria without providing for stringent measures within the contracts for protecting the environment of the host communities, particularly in the Niger Delta region.²⁴

In fact, if such rights are overtly enshrined and recognised in the Nigerian Constitution, fundamental rights enforcement cases would be unprecedented owing to the growing number of oil spills in the country, particularly in the Niger Delta area where oil pollution incidents are predominant.

In the Nigerian case of *Allar Irou v Shell BP*,²⁵ where the claimant sought for an injunction to restrain the defendant (Shell BP) from continuous pollution of his land, the High Court, refusing the request maintained that:

...Negligence or carelessness by the defendants’ employees cannot be controlled by the defendants. To grant the order...would amount to asking the defendant to stop operating in the area ...The interest of third

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Okechukwu Ejims, ‘The impact of Nigerian international petroleum contracts on environmental and human rights of indigenous communities’ (2013) AJICL 21 (3) 346.

²⁵

Suit No. W/89/71, Warri High Court, November 26, 1973.

persons must be in some cases considered e.g. where the injunction would cause stoppage of trade or throwing out a large number of people...mineral oil is the main source of this country's revenue...The defendant having being granted an oil exploration licence, an order for injunction may render ...nugatory...such licence.²⁶

In the light of the above case, there is no doubt that both the legislature and judiciary are fully conscious of the fact that substantial judicial proceedings with regard to oil and gas pollution would truncate or weaken exploration and production activities of TNCs. This standpoint may not be generalised in all jurisdictions in the world, but there is no doubt that the scenario is playing out in the Nigerian legal system. In fact, it is a traditional belief amongst victims of environmental pollution in the Niger Delta that pursuing a law suit for compensation against oil TNCs is an adventure in futility, because of the tendency of not getting justice due to Government's sympathy on oil operators.²⁷ In the *Jonah Gbemre* case, the ground-breaking case affirming the right to life and dignity of the human person to include environmental rights, the plaintiff's legal counsel was alleged to have reported that on May 31, 2006, the judge in the case had been removed from the Court in Benin and the file of the case could not be located.²⁸ The removal of the Judge was confirmed but the allegation of the missing file in 2006 may not be absolutely true as this researcher personally made an application to verify the case file on 4th April 2016 via the office of the Assistant Director Litigation, and although the file could not be located by members of staff in the court's 'strong room' and related offices, it was confirmed on the court's records that the case file was last sent to the office of the Assistant Director Litigation in January, 2016.

Wick submitted that the failure to enforce environmental standards against Shell (other oil companies as well) has attracted a series of allegations against the Nigerian government of manoeuvring a double standard by allowing oil TNCs in Nigeria to get away with many

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ibid.

²⁷

John Vidal, 'Niger delta communities to sue shell in London for oil spill compensation' *The guardian* (London, 7 January 2015) <<https://www.theguardian.com/environment/2015/jan/07/niger-delta-communities-to-sue-shell-in-london-for-oil-spill-compensation>> accessed 15 October 2015. See also Vanguard News, 'Nigerian King takes Shell to court in London' *Vanguard* (Nigeria, 22 November 2016) <<http://www.vanguardngr.com/2016/11/nigerian-king-takes-shell-court-london/>> accessed 23 November 2016.

²⁸

Gas Flaring Lawsuit (re oil companies in Nigeria) <<http://business-humanrights.org/en/gas-flaring-lawsuit-re-oil-companies-in-nigeria>> accessed 28 October 2015.

practices that would not be welcomed in Europe or US.²⁹ It follows that such environmental practices have led to a series of violence and judicial cases. In corroboration, the Human Rights Watch observed that the continued violence in the Niger Delta, particularly around oil facilities, is as a result of failed responsibilities on both the government and oil TNCs, and that with the synergy between government and oil companies operating in the Niger Delta, oil production is being supported at all cost.³⁰ Again, it is maintained that such support is anchored on economic grounds owing to its importance in the economic well-being of the State.

The Nigerian Senate disclosed that Nigeria has the highest number of oil spill incidences among oil producing countries with no penalty regime attached to such oil spills.³¹ This assertion may not be given much support in view of the numerous laws on environmental pollution and compensation in Nigeria, and which some have been discussed in Chapter 5 of this research.³² To allege that there is no penalty regime would amount to exaggeration; the truth lies in the many challenges (mostly on the economic grounds which contributes to the lack of enforcement of court orders and government policies relating to environmental pollution, the lack of public awareness on environmental issues raised in chapter 4, as well as the difficulties encountered in establishing negligence or the strict liability rule on the part of TNCs) bordering on the lack of will-power on the part of the executive and unwillingness of the judiciary to apply existing laws in strict sense.³³ It is submitted that the lack of will-power on the part of government in promoting environmental justice, could be linked with

²⁹

Laris Wick 'Human Rights Violations in Nigeria: Corporate Malpractices And State Acquiescence In The Oil Producing Deltas of Nigeria' (2003-2004) 12 Mich St UJ Intl L 63, 73.

³⁰

Human Rights Watch, Nigeria: No Democratic Dividend for Oil Delta (October 22, 2002) <<https://www.hrw.org/news/2002/10/22/nigeria-no-democratic-dividend-oil-delta>> accessed 5 August 2015.

³¹

Henry Umoru, 'Nigeria has highest oil spill in the world' Vanguard News (Nigeria, 14 November 2012) <<http://www.vanguardngr.com/2012/11/nigeria-has-highest-oil-spill-in-the-world-senate/>> accessed 15 August 2015.

³²

³³ See figure 5.3 on 'the Nigerian legal framework and issues of environmental responsibility'.

This issue is equally raised in figure 6.3 on 'the rationale for an absolute liability'.

corruption allegations within government agencies. Some of these allegations on corruption between government agencies and the TNCs are contained in a draft report issued by a Special Task Force set up by the Nigerian government (under former president Goodluck Jonathan) to look into the rot in the Nigerian oil industry which was headed by Nuhu Ribadu in 2012. The report was said to have implicated the Nigerian National Petroleum Corporation, which is the state oil firm, ministers, government agencies and oil majors in dodgy deals and mismanagement which is estimated to have cost Nigeria \$35 billion over the last 10 years.³⁴ Although, this report has received criticism in some quarters as unsubstantiated facts, it is widely believed by most Nigerians that the report should be given necessary attention.³⁵ It is maintained that if the aforesaid allegation and others are to be legally established, it will suffice to conclude that the corruption issues are contributing immensely against the attainment of environmental justice.

Kenneth Roth had pointed out that cases of security crackdown on local oil producing communities in the Niger Delta is an indication that the Nigerian government is continuing to use violence to protect the interests of international oil companies.³⁶ There are unsustainable reports from Human Rights Watch regarding incidents in which the Nigerian security forces have beaten, detained, or even killed inhabitants of the oil producing Niger Delta who were involved in protests over activities of oil companies concerning environmental pollution and compensation for resulting damage.³⁷ Philip Hammond (the then British Foreign Secretary), advised the Nigerian government in the face of recent oil pipelines bombings in 2016, to deal with the root causes or grievances of the Niger Delta people rather than resorting to military confrontations.³⁸

34

The Guardian, 'How to lose \$35bn' (Nigeria 13 November 2012)
 <<https://www.theguardian.com/world/2012/nov/13/nigeria-oil-corruption-ribadu>> accessed 27 June 2017.

35

ibid.

36

Human Rights Watch: Oil Companies Complicit in Nigerian Abuses (February 23, 1999)
 <<https://www.hrw.org/news/1999/02/23/oil-companies-licit-nigerian-abuses>> accessed 5 August 2015.

37

Human Rights Watch: Oil Companies Complicit in Nigerian Abuses (n 31).

38

Conversely, the government in recent years has put a couple of programmes to ameliorate the plight of the inhabitants of the Niger Delta. Of key importance, are the establishment of the Niger Delta Development Commission (NDDC),³⁹ the Niger Delta Ministry⁴⁰ and the Niger Delta Amnesty Programme.⁴¹ It is maintained that judges would take every step which the executive has taken to ameliorate the plight of inhabitants of the Niger Delta area into consideration whilst adjudicating on disputes relating to environmental pollution activities of TNCs. In essence, in a case of environmental pollution, it is possible that the Court may consider whether government through the aforementioned programmes and others has done anything reasonable to address the claims of the applicants or plaintiff. Although, in an argument for breach of fundamental rights to life and dignity of human person there are no such exceptions or qualified considerations as spelt out in the Nigerian Constitution if circumstances requires it to do so. In the English legal system, section 1(2) of the Human Rights Act provides, inter alia, that those rights (Convention rights)⁴² are to have effect for the purposes of the Act subject to any designated derogation or reservation,⁴³ and in *Marcic v Thames Water Utilities Ltd*,⁴⁴ Marcic's claim on violation of rights to private and family life

Vanguard News, 'UK warns Buhari: Using military confrontation in the Niger Delta could end in disaster' (Nigeria, 16 May 2016) <<http://www.vanguardngr.com/2016/05/uk-warns-buhari-using-military-confrontation-in-niger-delta-could-end-in-disaster/>> accessed 16 May 2016.

39

The commission is established by the Niger Delta Development Commission (Establishment etc) Act LFN 2000 NO 6 and its primary mandate is the conception, planning and implementation of projects and programmes for sustainable development of the Niger Delta area. See official website of NDDC at <<http://www.nddc.gov.ng/about%20us.html>> accessed 5 August 2015.

40

The Federal Ministry of Niger Delta Affairs was established former president (late) Umaru Musa Yar' Adua in 2008 in his drive to make the Niger Delta a better place, bring about peace and sustained development in the region. See <<http://www.nddc.gov.ng/about%20us.html>> accessed 5 August 2015.

41

The Niger Delta Amnesty Programme was equally established by ex-President (late) Umaru Musa Yar' Adua for ex-agitators in the Niger Delta region who accepted the federal government offer and registered for the rehabilitation and integration programme. See <<http://news.bbc.co.uk/1/hi/world/africa/8118314.stm>> accessed 5 August 2015.

42

The Convention Rights as incorporated in section 1(1) of the Human Rights Act 1998.

43

Human rights Act 1998, s 1(2).

44

was rejected by the courts on the ground that Marcic had failed to comply with provisions of the Water Resources Act set by Parliament (government) to address individual complaints regarding to alleged violations. Mr Marcic was held to have ignored the scheme, which was considered to be convention-compliant by bringing an action directly on Thames Water without any formal complaint to the Director of Water Resources (this office is now abolished by virtue of section 34 of the Water Act 2003). In view of this, it is mentioned that in satisfying this obligation of striking a balance between the interests of individuals and States, the court will give credence as to whether the State has complied with its own positive duty of taking ‘reasonable and appropriate’ measures in securing the victim or claimant’s rights. Under the Nigerian Constitution, such expanded discretion by the courts can only be exercised under sections 37-41, of which only section 37 which borders on the right to private and family life appears to be relevant to environmental issues as discussed in this research. Section 45 of the Nigerian Constitution provides that:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-in the interest of defence, public safety, public order, public morality or public health; or for the purpose of protecting the rights and freedom of other persons.⁴⁵

One defence or exception that is overtly missing from the above section 45 of the Nigerian Constitution is that of ‘economic well-being’; as this has been shown to be a ground under which the right to private and family life incorporated in the European Convention on Human Rights and automatically in the English legal system by virtue of the transplant of the Convention Rights can be infringed.⁴⁶ It could be suggested that the drafters of the Nigerian Constitution had never envisaged circumstances where the fundamental right to private and family life would be violated for economic reasons. Notwithstanding, this and other provisions of the Constitution mentioned earlier relating to fundamental rights to a pollution-free environment are given fuller consideration with regards the absoluteness of liability in chapter 6.

[2003] UKHL 66, [2004] 2 AC 42.

⁴⁵

Constitution of the Federal Republic of Nigeria, 1999 (as amended), s 45(1)(a)(b).

⁴⁶

See Article 8 (2) of the European Convention on Human Rights and Fundamental Freedoms 1950.

It is not overtly established whether judges would consider economic factors in fundamental rights enforcement proceedings, since it has been shown that the Nigerian Constitution does not capture ‘economic well-being’ as an exception in any of the provisions for fundamental rights infringement under Chapter IV (particularly the rights to life, dignity of the person and private and family life). But insight on the likely position of the Nigerian Courts in giving consideration to economic well-being of the State in deciding cases bordering on environmental rights enforcement can be extrapolated from the case of *Allar Iron v Shell BP* as mentioned above.⁴⁷ Albeit the judge had refused injunction to jettisoning oil mining activities of Shell BP, noting that the injunction if granted would truncate trade activities of the company, and bearing in mind that oil is the main source of the country’s revenue, the aforesaid case was based on common law principle of nuisance and negligence and not under fundamental rights enforcement as captured in the Constitution. It is believed that the Courts’ reasoning would be narrower and strict if such an injunction was sought under a proceeding for fundamental rights enforcement as clearly shown in the *Jonah Gbemre* case.⁴⁸

3.3.2 Judicial Technicalities and the Lack of Enforcement of Extant Environmental Laws

It is pertinent to point out that some other major challenges in the Niger Delta area with regard to environmental pollution and complaints of injustice seems to be surrounded by shortcomings from judicial interpretations and enforcement of environmental laws.⁴⁹ Investigations carried out by the Human Rights Watch in the Niger Delta concerning security force abuses on local inhabitants reveals that oil companies have not abided by environmental standards or provided adequate compensation in line with the damage caused through environmental pollution.⁵⁰ It is observed that the traditional principles of liability in

⁴⁷

Allar Iron (n 25).

⁴⁸

Jonah Gbemre v SPDC & Others (n 14).

⁴⁹

In figure 5.3 on ‘The Nigerian Legal Framework and Issues of Environmental Responsibility’, it is shown that there are sophisticated laws for the protection and preservation of the environment, but the problem lies in the lack of enforcement of these laws.

⁵⁰

Human Rights Watch, Report ‘The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities’ (January, 1999) 4
<<http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf>> at accessed 5 August 2015.

environmental pollution cases, such as the strict liability rule, liability principles surrounding the torts of nuisance and negligence are vague, or overtly unsatisfactory and undermines the legal rights of the inhabitants of such pollution prone areas to enjoy a safe (or healthy) environment. Owing to this, it is recommended in the current research that the judiciary should give adequate attention toward promoting fundamental rights relating to the protection and preservation of the environment, as these rights are seen to be given higher status over other rights regarding environmental liability and compensation claims.⁵¹ On the challenge raised by judicial technicalities, Kalu and Stewart have maintained that:

Litigation in regular courts has not helped the situation. This is primarily because the highly scientific, technical and sophisticated nature of the operations of oil companies makes it imperative for a plaintiff to be well versed in this area to be able to recover damages for his losses in suits for compensation or negligence.⁵²

Kalu and Stewart's position above deserves support owing to the legal burden encountered in establishing torts of negligence and other related torts in environmental pollution cases, particularly where most victims do not fully understand the operational rules and activities of the oil operators. In addition, it has been shown in a plethora of decided cases that TNCs mostly furnish the defence of 'malicious act of third parties' to escape liability, stating that the cause of oil spills is an effect of illegal oil bunkering and/or intentional pipeline vandalism by saboteurs, and this defence is valid in both common law and extant statutory schemes on environmental liability in Nigeria,⁵³ particularly the Oil Pipelines Act.⁵⁴

It was mentioned in the *Bodo Community*⁵⁵ case that the 'reasonable steps' to be taken by TNCs in protection of oil pipelines, can, in some cases, be interpreted as including curtailing

⁵¹

An argument is made in chapter 6, particularly under figure 6.5 for the transformation of traditional common law principles on environmental liability as applicable in Nigeria to absolute liability via fundamental rights enforcements.

⁵²

Victoria E Kalu and Ngozi F Stewart, 'Nigeria's Niger Delta Crises and Resolution of Oil and Gas Related Disputes: Need for a Paradigm Shift' (2007) 25 JENRL 244, 253.

⁵³

See *The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd*, [2014] EWHC 1973 (TCC) [93] (Mr Akenhead).

⁵⁴

Cap O7 LFN 2004, s 11(5)(c).

intentional acts of sabotage.⁵⁶ Owing to this, TNCs would be deemed, in some exceptional cases not to have taken ‘reasonable steps’ if they fail to comply with modern technologies that could safeguard the pipelines and other installations.⁵⁷ For instance, installation of anti-tampering equipment or other sort of technology to maintain rapid surveillance would amount to reasonable or preventable steps to avoid oil spills. Technically, it would be difficult for a claimant to prove through direct evidence that TNCs have not taken reasonable steps to protect oil pipelines.⁵⁸ It is against this background that an argument for the enforcement of fundamental rights relating to the environment is raised in chapter 6 of the research. It is argued that enforcement of these rights would generate a higher level of environmental responsibility by TNCs.

Again, despite government’s programmes put in place to address the plight of the people, there seem not to be much achieved to improve the welfare of the people. This might be linked to cases of corrupt officials appointed to oversee the affairs of the various organs established by the government.

Looking at the existing legislation in Nigeria, particularly the statutes mentioned in chapter 5 of this research,⁵⁹ including environmental provisions in the African Charter on Human and People’s Right (Ratification and Enforcement) Act,⁶⁰ and the Nigerian Constitution, there is no gainsaying that the Nigerian environmental legal regime is adequately equipped to address

55

The Bodo Case (n 53)

56

The Bodo case (n 53) [93].

57

The Bodo case (n 53) [92] (g).

58

See discussion in figure 5.4 on ‘responsibility and compensation in oil and gas pollution incidents in Nigeria’ on some of the technicalities involved in proving ‘negligence’ against TNCs.

59

See figure 5.3 in chapter 5 entitled ‘The Nigerian Legal Framework and Issues of Environmental Responsibility’.

60

Cap A9 Vol 1 LFN 2004.

cases of pollution caused by oil and gas. Although, Bukola Saraki (in the Nigerian Senate) had maintained that due to lack of penalties and cost framework much of the spills in Nigeria have been ‘ignored, neglected and in most cases never cleaned up or the sites remediated’.⁶¹ This latter position could be supported, but it is worth mentioning that a substantial part of environmental challenges faced in Nigeria is anchored on the reluctance of the courts to give strict interpretations to extant laws on environmental protection and preservation as shown throughout this research.

3.3.3 The Lack of Public Awareness on Environmental and Procedural Issues

A major factor dimming the lights of environmental rights enforcement in Nigeria is the issue of inadequate public awareness on environmental matters. The concept of public awareness generically entails: access to information on environmental matters, public participation in environmental decision-making as well as access to justice. Due to the significance of public awareness on the environmental problems in Nigeria, a separate chapter (chapter 4) is reserved for it. Significant laws in that regard, such as; the Environmental Impact Assessment Act Cap E12 LFN 2014, Freedom of Information Act 2011 No. 4 and the African Charter,⁶² were given consideration. It is imperative to point out that government must take up full responsibility to create the sort of environment where the negative impacts of the activities of Transnational Corporations would be collectively known by the inhabitants (this duty would be fused with parental and school responsibilities in educating the grassroots), this is because one of the major challenges with regards environmental harm and failure to enforce environmental rights is due to the ignorance of the level of industrial pollution on the part of the locals. In fact, protection of the environment should be a matter of fundamental right, and that is the rationale for the current thesis. It is maintained that Access to information on environmental issues, which entails creating education in environmental matters and public participation in decision making be given priority by government.⁶³ This applies to the need for access to environmental justice as discussed in figure 4.5.

⁶¹

Henry Umoru, ‘Nigeria has highest oil spill in the world’ Vanguard News (Nigeria, 14 November 2012) <<http://www.vanguardngr.com/2012/11/nigeria-has-highest-oil-spill-in-the-world-senate/>> accessed 15 August 2015.

⁶²

African Charter (n 18).

⁶³

See figures 4.3, 4.3.2 and 4.4 for the discussion on access to environmental information,

3.4 Conclusions

The current chapter has expatiated on the concept of ‘judicial legislation’ and some aspects of the theory of economics and law. It is stated that one of the primary sources of law is case-law or judicial precedence, and this is predicated on the use of judicial discretion in a judicious manner to promote consistency in the body of the law. This awareness is deployed due to the numerous challenges encountered in attaining environmental justice in Nigeria; and due to lack of explicit legal provisions upholding environmental rights, there is need for the courts to give wider interpretations to existing relevant fundamental rights to secure a healthy environment. In this regard, legal provisions are found in the Nigerian Constitution as well as the African Charter relating to environmental protection as discussed; and in the Nigerian Constitution, the most direct one is precatory (section 20 of the Nigerian Constitution), while the enforceable provisions perceived to guarantee environmental rights are ambiguous. But in all, the intentions of the drafters of the Constitution are easily deciphered with the aid of judicial pronouncements as seen in the *Jonah Gbemre* case.

It is observed that government (including the judiciary) is committed to protecting the interest of oil TNCs owing to the economic benefits derived from oil and gas activities, and this trend is seen as a major challenge towards enforcement of environmental rights in the sense that government may not be inclined to push for draconian laws, like explicit fundamental rights to a clean environment, which would likely affect activities of oil operators. In recent years, there are reported cases of victims of environmental pollution in the Niger Delta seeking for justice in foreign courts. Many have expressed fear that if they seek for redress in the Nigerian courts the oil TNCs will always win due to government interest.⁶⁴ This has inevitably led to victims of environmental pollution in Nigeria looking for justice in foreign courts, and those who could not afford the rigors of litigation have resorted protests which has consequently led to major confrontations between government security forces and the protesters. In this vein, it is highlighted that Nigeria is rich with a series of statutes on environmental liability but there are major shortcomings in the aspect of judicial technicalities, lack of enforcement and inadequate public awareness on environmental issues.

64

See figure 5.4 on this issue. See also John Vidal, ‘Niger delta communities to sue shell in London for oil spill compensation’ *The guardian* (London, 7 January 2015) <<https://www.theguardian.com/environment/2015/jan/07/niger-delta-communities-to-sue-shell-in-london-for-oil-spill-compensation>> accessed 15 October 2015.

The next chapter addresses issues of public awareness in addressing environmental problems. The complementary aspects of public awareness such as: access to information on environmental matters, public participation in environmental decision-making, and access to justice in environmental disputes would be discussed with a view to establishing their nexus and significance to environmental rights enforcement.

CHAPTER 4

ISSUES OF PUBLIC AWARENESS IN DEALING WITH ENVIRONMENTAL CHALLENGES

4.1 Introduction

This chapter considers the significance of public awareness in addressing environmental challenges. A global claim to the environment as a form of right was proclaimed in the first United Nations Conference on the Environment in 1972 (otherwise known as the Stockholm declaration) where it was upheld that ‘man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing.’¹ The Stockholm declaration holds further that human beings are entrusted with the goal of protecting and improving the environment for ‘present and future generations.’² It becomes incumbent, therefore on responsible governments and organizations to promote public awareness of environmental matters with a view to protecting the environment. This is because public awareness on environmental issues could be considered as the procedural aspect of the right to a safe environment.

The crux of this chapter is to create nexus between public awareness, principles of environmental liability and fundamental rights to a clean environment, and this is aimed at addressing one of the key hypotheses of this research, which is to examine ‘whether public awareness may contribute to reduce the risk of environmental pollution’. It is surmised that fundamental rights issues as it relates to environmental protection will be undermined if there are inadequate efforts put towards fashioning public awareness in environmental matters. The more focus is being given to creating awareness of environmental matters, the more consciousness there will be of the need to utilise judicial measures to obtain redress, particularly through fundamental rights enforcement procedures, which forms the focal point of the current research. The rationale behind the Aarhus Convention,³ which borders on

¹

Declaration of the United Nations Conference on the Human Environment (Stockholm) UN Doc.A/CONF/48/14/REV.I Principle 1.

²

ibid.

³

public awareness, is equally hinged on the need to protect environmental rights. It provides that:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her wealth and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters, in accordance with the provisions of this Convention.⁴

Addressing environmental challenges through public awareness or public participation has widely become a norm at both international and national jurisdictions. This is encapsulated in principle 10 of the well-known Rio Declaration, which provides:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.⁵

It is clear from the above that individuals must first be given adequate information on environmental matters which would enable them to make adequate contributions in the decision-making processes. This is because members of the public would be placed in a position to make informed decisions. It follows that the need to gain effective access to justice in events of environmental abuse cannot be overemphasised.

Reference is made to English law, international law and European Union case law with regard to issues bordering on the promotion of environmental rights in Nigeria. This is because of limited case law and legal instruments supporting fundamental rights to the environment in Nigeria despite the proliferation of environmental abuse as a result of oil and gas activities of oil transnational corporations. There is also the need to compare and contrast

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998).

4

Aarhus Convention (n 3), art 1.

5

United Nations Conference on Environment and Development (adopted 3-14 June 1992) A/CONF 151/26 Vol 1.

applicable practices within the sphere of environmental rights in other jurisdictions to practices in Nigeria with a view to aligning with global best practices.

4.2 Meaning of the Environment and Environmental Information

Both the Osborn's Concise Law Dictionary⁶ and the Dictionary of Law by Curzon⁷ retain the same definition of environment as provided by the Environmental Protection Act.⁸ The Environmental Protection Act as applied in the UK succinctly puts:

The "environment" consists of all, or any, of the following media, namely, the air, water and land; and the medium of air includes the air within buildings and the air within other natural or man-made structures above or below ground.⁹

In the light of the foregoing definition, it is established that the environment encompasses the elements of air, water and land. In essence, the environment entails the existing relationship between man, animals and plants to land, water and air. It follows that when the concept of environmental awareness is mentioned, it addresses the correlation or interrelationship between the latter elements having man at the centre.

On the other hand, environmental information has been considered as 'any information in written, visual, aural, electronic or any other material form on the state of the elements of the environment'.¹⁰ This meaning is explicit enough to be applied in any jurisdiction, but it is worth mentioning that such information within the context of public awareness, is that relating to the state of human health and safety, and that a failure to provide such information would violate existing fundamental rights of the individual in its community.

6

Mick Woodley (ed), *Osborn's Concise Law Dictionary* (10th edn Sweet and Maxwell, 2005) 159.

7

Leslie B Curzon, *Dictionary of Law* (6th edn, Pearson Education 2002) 155.

8

Environmental Protection Act 1990.

9

ibid, s 1(2).

10

The Environmental Information Regulations 2004 NO. 3391 Regulation 2(1) (a).

4.3 Access to Information on Environmental Issues

Access to environmental information is a *sine qua non* in achieving the goal of public awareness or public participation as mentioned above. Stookes has maintained that “without proper access to information, the other procedural rights of public participation and access to justice are likely to be far less effective”.¹¹ In the same vein David Hughes and others were of the view that, ‘without rights of access to information, environmental justice collapses and environmental law becomes unenforceable and produces discontent from a suspicious public’.¹² The aforesaid submissions are suggestive that access to environmental information is the bedrock or most critical aspect amongst the three pillars of environmental public awareness. This latter position is over-stated owing to the fact that without obtaining legal redress, justice may be unavailable. The crux is that all three pillars of public awareness must be complemented in order to produce a significant result. The provision of information has been classified in two categories; passive information provision and active information provision. In the former, environmental information is only made available by government authorities on the request by an individual or organization.¹³ In essence, it is less likely that information would be made available to the public domain if no request is made. In the latter, public authorities are obliged, either under legislation or policy to make information available for public use without any formal request. In an earlier mentioned case of *Guerra v Italy*¹⁴ before the ECtHR, the Italian authorities were liable for violating the rights to Freedom of Information of the Applicants under Article 10 of the ECHR for failing to inform local inhabitants of industrial hazards, safety measures to be taken, emergency strategies and procedure to be followed in the event of an accident emanating from a chemical factory classified as ‘high risk’. The necessity of such information obligated by law falls within the ambit of the ‘active information provision’.

¹¹

Paul Stookes, *A Practical Approach to Environmental Law* (OUP 2005) 33-34.

¹²

David Hughes and others, *Environmental Law* (4th edn, Butterworths 2002) 151.

¹³

ibid 34

¹⁴

[1998] 26 EHRR 357, [1998] 4 BHRC 63. See figure 2.3 for the full facts of the case.

The right to access public information is a global quest and international regimes have confirmed this through a wide range of Conventions. By virtue of Article 27 of the Convention Concerning the Protection of the World Cultural and Natural Heritage,¹⁵ State Parties to the Convention are obligated to educate or inform citizens of their cultural and natural heritage, and shall keep the public broadly informed of the dangers threatening such heritage. In line with Article 5(d) of the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification Particularly in Africa (UNCCD),¹⁶ Member States are expected to promote awareness and facilitate the participation of local populations in efforts to combat desertification and mitigate the effects of drought. In the same vein, Article 6 of the United Nations (UN) Framework Convention on Climate Change,¹⁷ provides inter alia, that in carrying out commitments under the Convention, Member States shall promote and facilitate at national, sub-regional and regional levels; the development and implementation of educational and public awareness programmes on climate change and its effects;¹⁸ public access to information on climate change and its effects¹⁹ and public participation in addressing climate change and its effects and developing adequate responses.²⁰ It is pertinent to note that the requirement of ‘public participation’ in the UN Framework Convention on Climate Change retains a wider meaning than ‘public participation in environmental decision-making’ as discussed in figure 4.4. This is because, Article 4(1)(i) of the aforesaid Convention mandates parties to ‘promote and cooperate in education, training and public awareness related to climate change and

¹⁵

Adopted 16 November 1972.

¹⁶

(Adopted 14 October 1994). Entry into force 26th December 1996.

¹⁷

(Adopted 9 May 1992). Entry into force 21 March 1994.

¹⁸

ibid, art 6 (a) (i).

¹⁹

ibid (ii).

²⁰

ibid (iii).

encourage widest *participation* in this process, including that of non-governmental organizations'. In essence, 'public participation' under the Convention on Climate Change connotes participation by members of the public, including non-governmental organisations in the process of training, educating and creating public awareness in issues bordering on climate change. Conversely, the concept of public participation in environmental decision making as discussed in figure 4.4 is concerned with attempts to influence law, policies, and decisions made by government or regulatory bodies.²¹

In line with the widespread acceptance of the need for regional, sub-regional and national bodies to maintain the practice of disseminating information or allowing access to public data, there is an increasing support for the notion that principle 10 of the Rio Declaration²² has or may have acquired the status of 'customary international law'.²³ The validity of the aforesaid assertion can be verified through international case law. Although the *Guerra* case is regional,²⁴ in the *Pulp Mills Case*,²⁵ Argentina on her part maintained that the environmental impact assessment transmitted to it by Uruguay were incomplete, in that they failed to include any consultation with the affected populations.²⁶ The International Court of Justice considered that the procedural obligations of informing, notifying and negotiating with regards to any activity in the River Uruguay as set out in the 1975 Statute is agreed on

²¹

Stuart Bell and others, *Environmental Law* (8th edn OUP 2013) 315

²²

Principle 10 of the Rio Declaration as shown above emphasises on the importance of States to maintain public awareness in dealing with environmental issues.

²³

Uzuazo Etemire, 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' (2014) 3 TEL 149, 153.

²⁴

A decision of the European Court of Human Rights enumerating on the necessity of disseminating environmental information to the applicants.

²⁵

Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep14.

²⁶

ibid [118].

by the parties.²⁷ In upholding the universality of the need for access to environmental information, through EIA, the ICJ maintained that:

...The obligation to protect and preserve...has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context...²⁸

The position of the Court seems to be favourably disposed to the fact that public consultation in matters of environmental safety is a prerequisite and an integral part of EIA. In what appears to be a deviation, the Court was of the view that there was no subsisting legal obligation to consult the affected populations from the instruments showcased by Argentina.²⁹ Whilst it is clear that the reliance of the Court on an agreement or treaty in order to consider public consultation an integral part of EIA is a substantial limitation on environmental litigation, Boyle has submitted that ‘there should have been no difficulty in persuading the Court of the general principle that public consultation is a necessary element of the EIA process’.³⁰

Again, Harrison pointed out that the International legal system is decentralised, connoting that jurisdiction emanates from the consent of the parties.³¹ This, according to Harrison, is anchored on ‘Compromissory Clauses in Treaties’ where parties consent in advance to submit to certain jurisdiction and thereby limit the scope of such jurisdiction to the treaty. This trend has been considered a setback in international environmental rights claims owing to the fact

²⁷

Pulp Mills (n 25) [81].

²⁸

Pulp Mills (n 25) [204].

²⁹

ibid [216].

³⁰

Alan Boyle, ‘Pulp Mills Case: A Commentary’ 2015
<http://www.biiicl.org/files/5167_pulp_mills_case.pdf> accessed 20 April 2015, P 3.

³¹

James Harrison, ‘Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental’ (2013) 25 JEL 25 501.

that ‘courts or tribunals may not be able to decide all aspects of environmental harm that may have been caused in a particular case’. In the *Pulp Mills* Case, the ICJ relied on the Statute of Uruguay 1975 and other related documents to justify its position that ‘no legal obligation to consult the affected populations arises for the parties...’³²

It is maintained that even if the ICJ noted in the *Pulp Mills* Case that Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and Uruguayan sides of the river,³³ its remark on the fact that there was no legal obligation in consulting the population in any of the tendered instruments is a point which must be noted as a shortcoming in the global right for access to environmental information by the public. This, admittedly, is a shortcoming because environmental information under international Conventions as mentioned earlier should be rendered freely and not anchored on the exigencies of certain legislation or agreements, particularly where it is clear that environmental activities would pose a threat to inhabitants. Bell, McGillivray and Pedersen have opined that the aim of ‘access to environmental information’ is ‘to ensure that information about the environment is freely available, so as to enhance the public’s role in decision-making in relation to environmental matters on an informed basis’.³⁴

The right to access environmental information under the Freedom of Information Act in Nigeria is seemingly ‘passive’, connoting that environmental information is made available by government authorities at the request of the applicant. This method of obtaining environmental information does not adequately conform with the key objective of the right to access environmental information, rather, citizens or inhabitants at all times should be actively involved, i.e. by virtue of policies or laws gain automatic information on their immediate environment. This would provide a reasonable foresight on imminent risks associated with the environment. It follows that legal backings on the need to carry out Environmental Impact Assessment on certain projects would be more beneficial.

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Pulp Mills (n 25) [216].

³³

ibid [217].

³⁴

Stuart Bell and others, *Environmental Law* (8th edn OUP 2013) 315.

Environmental Impact Assessment (EIA) is a formal process by which a proposed activity with potentially significant environmental, social and economic costs is carefully studied with a view to evaluating its impacts, examining alternative approaches and developing measures to prevent or mitigate the negative impacts.³⁵ It is obvious that the EIA process or study would require engaging the inhabitants of the location where such projects will be situated and in the course of such engagements, inhabitants will access necessary environmental information. Ingelson and Nwapi had maintained that one of the primary reasons for conducting EIAs is to inform the public of the proposed projects thereby establishing a meaningful dialogue with a view to identifying and deploying safeguards to mitigate adverse environmental impacts from the proposed activity.³⁶ In Nigeria, one of the goals of environmental impact assessment as contained in the Environmental Impact Assessment Act³⁷ is:

...To encourage the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental effects on boundary or trans-State or on the environment of bordering town and villages.³⁸

In light of the foregoing, it is clear that the EIA process includes consultation and exchange of information between organs and persons with regard to projects which will significantly affect the environment.³⁹ It has been submitted that although the EIA Act in Nigeria requires the EIAs before a variety of projects can proceed, there is a general perception that EIAs are seldom carried out in Nigeria.⁴⁰ The failure to carry out EIAs by major firms and government

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Allan Ingelson and Chilenye Nwapi, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10 (1) Law, Environmental & Development Journal 3.

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Ingelson and Nwapi (n 35).

³⁷

Environmental Impact Assessment Act Cap E12 LFN 2014.

³⁸

ibid, s 1(c).

³⁹

See also section 11(1) (c) of the EIA Act (n 34) which requires consultation in the course of the EIA.

⁴⁰

agencies would not be unconnected with the allegations of corruption and impunity within the system, this is probable because there are staggering reports that government officials in most agencies that are mandated to enforce these statutory requirements (EIAs and others), are alleged to be collaborating with TNCs for personal gains,⁴¹ and this development could lead to compromise in discharge of official duties. This raises the issue and the need for access to justice as a key factor because inhabitants who are at the receiving end of the effects of dangerous activities on the environment are in a position to see to it that the law is enforced through litigation and other means of enforcement.

It is submitted that in incidents of environmental degradation, it is certain that there would be a cause of action for fundamental rights violation relating to non-provision of information on the activities leading to the pollution, although this will not be the case in every pollution incidents, it would apply in cases where necessary information is denied of inhabitants. Whilst expatiating on the nexus between environmental information provision and fundamental rights actions, Jonathan stated that:

In addition to the obligation of States to urgently inform individuals likely to be affected by any situation or event which could suddenly produce effects that are deleterious to their environment, States should also give due notice of an intention to undertake or authorize activities which might make a considerable impact on their environment. Failure and or refusal of government or relevant agencies to provide such information amounts to deprivation of fundamental right to environment, which affects the exercise of all other rights.⁴²

By virtue of Article 9(1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,⁴³ 'every individual shall have the right to receive information'. Although the provision is silent on the nature of information or the sort of institutions

Ingelson and Nwapi (n 37).

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Reuters, 'Exclusive: Nigeria loses billions in cut price oil deals-report' (Nigeria 24 October 2012).
<<http://www.reuters.com/article/us-nigeria-oil-idUSBRE89N0VV20121024>> accessed 27 June 2017.

42

EA Jonathan, 'Fundamental Human Right to Healthy Environment (a case for justiciability)' (2011) Human Rights Review- An International Human Rights Journal-An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, and the National Human Rights Commission of Nigeria 2(2) July p182.

43

Cap A9 LFN 2004.

obligated to tender information, it is submitted that such a right is all-encompassing, and would be effective provided the non-compliance of the provision would violate the right(s) of the individual within the context of environmental rights.

In the Nigerian environmental landscape, Etemire pointed out that until the introduction of the Freedom of Information Act (FOI Act) 2010 Nigeria had maintained a culture of secrecy in environmental governance with its attendant harm to the environment and public well-being.⁴⁴ This assertion is to a reasonable extent, correct, owing to the fact that the Nigerian FOI Act is one legal instrument that was long awaited, and the desire of individuals and organisations to gain access to public information has been intense; bearing in mind that the EIA process under the EIA Act is rarely complied with. It is averred that complementary provisions relating to access to environmental information under the EIA Act and the FOI Act will produce a cumulative effect on the legal rights to access environmental information. This is logical bearing in mind that EIAs are carried out at preliminary stages before projects are embarked upon, there would be need for inhabitants to get additional information even after the project is completed. For instance, in oil wells drilling and laying of pipelines, there is the likelihood that communities around such areas would need to be updated periodically on the impacts of the existing installations, and in this regard, the FoI Act may be utilised.

4.3.1 Are Private Companies under any Obligation to Provide Environmental Information?

There is no gainsaying that oil TNCs are directly involved in the majority of activities devastating the environment in Nigeria, particularly in the Niger Delta region.⁴⁵ The Aarhus Convention⁴⁶ as earlier mentioned is relevant with regard to public awareness and it is overtly supportive of the need for contracting parties to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her wealth and well-being, and for each party to guarantee the rights of access to information.⁴⁷ A question for consideration is who is obligated to render stewardship or

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Etemire (n 20) 149.

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Olanrewaju Fagbohun, 'Imperatives of Environmental Restoration Due to Oil Pollution in Nigeria' (2007) 18 SLR 347, 348.

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Aarhus Convention 1998 (n 3)

provide environmental information under the convention? From provisions of Article 2(1) of the Aarhus Convention, 'Public Authority' means:

- (a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment ;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above.⁴⁸

The key provisions and objectives of the Aarhus Convention are being implemented in England and Wales by virtue of the Environmental Information Regulation (hereinafter EIR).⁴⁹ The EIR defines public authority to mean:

- (a) Government departments;
- (c) Any other body or other person, that carries out functions of public administration; or
- (d) Any other body or other person, that is under the control of a person falling within subparagraphs (a), (b) or (c) and-
 - (i) has public responsibilities relating to the environment;
 - (ii) exercises functions of a public nature relating to the environment; or
 - (iii) provides public services relating to the environment.⁵⁰

It appears that the determination of whether a body is a public authority is complex, and in most cases, determined through mixture of fact and law. The provisions of what constitutes

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Aarhus Convention 1998 (n 3), art 1.

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ibid, art 2(2) (a) (b) and (c).

⁴⁹

Environmental Information Regulation (Statutory Instrument 2004 No. 3391).

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EIR (n 40) Regulations 2(2)(a) (c) and (d).

‘public authorities’ under the Freedom of Information Act in the UK⁵¹ appear vague but it can be pointed out from the provisions of sections 3 and 6 of the Act that public authorities include a person holding a public office, and a publicly owned company which is wholly owned by the crown or any public authority listed in the Act with certain exceptions as listed in the Act.⁵² However, private companies are not inclusive.

It is necessary to recall that the Human Rights Act guarantees the freedom of information (a Convention right), which through case law is shown to include environmental information. In this regard, it is unlawful for a public authority to act in a way which is incompatible with Convention rights.⁵³ The Human Rights Act has defined ‘Public Authority’ to include ‘any person certain of whose functions are of a public nature...’⁵⁴ In resolving the question of what amounts to a Public Authority, the case of *Smartsources Drainage & Water Reports Ltd v Information Commissioner*⁵⁵ would serve as a guide. In that case, the Appellant (Smartsources), a specialist business that provides information relating to pipe locations, water, waste water billing and related data in England and Wales requested a different sort of information from both Water and sewerage companies (WASCs) and Water only companies (WOCs), ranging from (1) their asset mapping database; (2) water and sewerage billing records; (3) a list of all properties subject to “building over agreements”; (4) sewer flooding register; (5) water pressure register; (6) water quality reports; and (7) trade effluent register. Both WASCs and WOCs agreed to provide the information requested under figures (6) and (7) mentioned above, where there are concrete legal provisions authorising rights of access outside the Environmental Information Regulation (EIR) 2004. However, they refused to provide information on the other categories, mainly on the ground that they were not public

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Freedom of Information Act 2000.

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FoIA UK (n 51), s 3 (1) and s 6(1)(a) and (b).

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Human Rights Act 1998, s 6(1).

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ibid s 6(3).

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[2010] UKUT 415 AAC, Upper Tribunal (Administrative Appeals Chamber).

authorities within the EIR 2004. Consequently, the Appellant complained to the Information Commissioner, who equally concurred via a letter on the 12th of March 2010 that he does not retain jurisdiction to entertain the complaint on the basis that the water companies were not public authorities. Conversely, in the other jurisdictions in the UK, both Northern Ireland and Scotland, there is a single water company solely owned by the government. For instance, the Scottish Water is listed under Schedule 1 (paragraph 102) of the Freedom of Information Act 2002⁵⁶ as a public authority.

The Appellant thereafter approached the Upper Tribunal (Administrative Appeals Chamber), where the appeal was dismissed. The primary issue for determination in the Smartsources case, therefore, was whether a privatised water company is a public Authority for the purposes of the Environmental Information Regulations? This was answered in the negative. In coming to its conclusion, the Tribunal had taken a plethora of judicial cases into consideration. The Tribunal had given credence and made reference to the case of *Cameron v Network Rail Infrastructure Ltd*,⁵⁷ where a High Court held that Network Rail Infrastructure Ltd, a private company rendering public services was neither a core nor a hybrid public authority for the purposes of section 6(3) of the Human Rights Act 1998. The Tribunal equally submitted to the argument that in determining a ‘Public Authority’ under Regulation 2(2)(c), the focus of the Court is not necessarily whether the body is public or private, but whether the body is carrying out functions of a public nature.⁵⁸ However, the Tribunal admits that the ambit of Regulation 2(2)(c) as mentioned earlier is narrower than the scope of the Human Rights Act which referred to public authorities as ‘persons certain of whose functions are functions of a public nature...’ This, according to the Tribunal is suggestive that a body may be a public authority for the purpose of the Human Rights Act and yet still fall outside Regulation 2(2)(c) of the EIR.⁵⁹ Due regard was given to the fact that the mere existence of

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Freedom of Information (Scotland) Act 2002.

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[2006] EWHC 1133 (QB).

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Smartsources case (n 55) [55].

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Smartsources case (n 55) [63].

an intensive regulatory regime does not translate that the provision of the service is a function of public nature. The Tribunal noted that several of the water companies can buy each other, or buy parts of each other subject to competition legislation, and this is a pointer to the fact that the water companies are not public authorities.⁶⁰

Looking at the key principles in the *Smartsource* case, it may be submitted that oil TNCs are not likely to be considered as public authorities for the purposes of the Environmental Information Regulation and the Human Rights Act 1998. This position would be justified on the grounds that oil companies are basically carrying out functions of a private nature and they do retain the discretion of selling off major share or stakes, and their activities are only governed by government regulations or laws. Conversely, it has been shown from the *Smartsource* case that the determination of whether a company is a public authority or not is complex, particularly in circumstances where Oil Companies are jointly owned by government and private entities. Furthermore, TNCs, although are basically private entities, they do play public roles. By virtue of the Freedom of Information Act in Nigeria, Public Institution has been defined as:

...Any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those body including but not limited to committees and sub-committees which are supported in whole or in part by public fund or which expends public fund and private bodies providing public services, performing public functions or utilizing public funds.⁶¹

A combined reading of the Environmental Information Act in England and Wales, the Human Rights Act 1998 in UK, and the Freedom of Information Act 2011 in Nigeria, points to the fact that apart from government departments, institutions performing public functions are legally bound to provide information on request by applicants. Madichie, a legal adviser to the Nigerian National Petroleum Corporation (NNPC) observed that the NNPC, being a statutory corporation, does not fall within the ambit of a Public Institution as defined by the FoI Act.⁶² This stance was described by the Vanguard as a ‘strange response’. However, the

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Smartsource (n 55) [64].

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Freedom of Information Act 2011 No. 4, s 31.

⁶²

then group managing director of the Corporation had debunked the position of the legal adviser, maintaining that the NNPC abides by the provisions of the FoI Act.⁶³ Ordinarily, there ought not to be any ambiguity on whether a government corporation such as NNPC (including its subsidiary companies) falls within a ‘public institution’ as defined by the Freedom of Information Act, this is primarily anchored on the grounds that the Corporation is supported by public fund and it expends public fund, and it is the main representative of government in the petroleum sector. Also, the Department of Petroleum Resources, a department within the Federal Ministry of Petroleum, which is saddled with the duty to establish and enforce environmental regulations, is a key government department where tangible environmental information would be obtained.⁶⁴ Or better still, the National Oil Spill Detection and Response Agency (NOSDRA),⁶⁵ which is actively involved in incidents of oil spills in Nigeria would practically be a warehouse for environmental information to be retrieved through the instrumentality of the FoI Act.

It is submitted that even if the Nigerian subsidiaries of oil TNCs can be seen as private companies excluded from the FoI Act, it is clear that the Nigerian government through its representative agencies and corporations in the oil industry will be legally obliged to provide environmental information to the public, since it is clear that government has major stakes in all private oil companies. Furthermore, legislators may want to demystify the conundrum of specific organisations that constitute ‘public authorities’ by listing such bodies, as it is the case in Schedule 1 of the Freedom of Information (Scotland) Act mentioned above.⁶⁶

Vanguard News, ‘NNPC and the FoI Act’ (Nigeria, 22 August 2012)
<<http://www.vanguardngr.com/2012/08/nnpc-and-the-foi-act/>> accessed 5 February 2015.

⁶³

ibid.

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Nigerian National Petroleum Corporation, ‘About NNPC’ Available at
<<http://nnpcgroup.com/AboutNNPC/CorporateInfo.aspx>> accessed 4 August 2015.

⁶⁵

National Oil Spill Detection and Response Agency <<http://nosdra.org.ng/>> accessed 4 August 2015.

⁶⁶

See FOI (Scotland) Act (n 56).

It appears that a vast majority of inhabitants of oil producing areas are not inclined to request environmental information from TNCs, and this neglect in accessing environmental information is a general shortcoming even amongst the media. Ajibola observed that for a country whose budget is funded by the proceeds of sale of oil and gas, it is expected that the media would constantly demand transparency and accountability in the oil and gas sector, but this is not the case, rather, the petroleum industry in Nigeria is seen as the most secretive business environment in Nigeria.⁶⁷ This latter position could be associated with the lack of enforcement or inadequate awareness on extant laws and procedures to access information.

It is noted that existing legislation on access to environmental information are basically passive in nature, that is, information is not likely to be given freely to inhabitants except on request. With regards to the sort of dangerous environmental activities in the Niger Delta, it would be imperative for public authorities to be obliged, either under legislation or policy to make information available for the public use without any formal request by citizens.

Looking at Article 9(1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,⁶⁸ which states that 'every individual shall have the right to receive information', it would seem that the provision can be interpreted as generating both passive and active rights to access environmental information. Again, this provision, bordering on fundamental rights, could not be seen to exonerate private oil multinationals on the obligation to provide information. In view of this, it will be correct to submit that Article 9 above can be invoked against oil TNCs where they fail to provide environmental information, provided the applicant can show that such information is one that would affect his person, in essence there must be a reasonable cause of action. This is because, both fundamental rights provisions in the Constitution and the African Charter are to be expansively and purposely interpreted by the Courts with a view to advancing and realising the rights and freedoms contained in them.⁶⁹

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Ajibola Amzat, 'Poor media coverage of oil-gas industry' *The Guardian* (Nigeria, 19 March 2015) <<http://guardian.ng/opinion/poor-media-coverage-of-oil-gas-industry/>> accessed 10 August 2015.

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Cap A9 LFN 2004.

⁶⁹

Fundamental Rights (Enforcement Procedure) Rules, 2009 Preamble 3(a).

Despite the legal mandates with regards to the provision of environmental information, government has a positive duty to provide information for the well-being of the citizenry, this is pertinent, owing to the *Public Trust Doctrine* in environmental matters where the State is considered as a trustee of all natural resources,⁷⁰ and this duty, no doubt entails a preservation of the environment which man is at the centre. The National Policy on the Environment which defines a framework for environmental governance in Nigeria recognises in its Action Plan the need for environmental reporting in the management of natural resources as well as embarking on environmental impact assessment for major development project.⁷¹ It is maintained that these plans, if fully implemented as equally incorporated in various statutes mentioned, would sufficiently provide environmental information at the threshold of inhabitants. Despite the sufficient presence of legal and institutional framework, there is a disappointing reluctance to implement on the parts of the government and oil TNCs.

At the 9th National Council on Environment 2013, the Bayelsa State government had alleged the failure of Chevron Nigeria Limited to comply with provisions of the Environmental Impact Assessment Act 1992, by embarking on a drilling project without EIA and the eventual damage to the environment by gas explosion in the course of the drilling.⁷² In response, the Council had agreed to urge the Federal Ministry of Environment to take urgent action.⁷³ It would be surprising to witness a TNC embarking on such a sensitive project without carrying out due consultations under the EIA Act. This is a reflection of some of the challenges or level of impunity witnessed in the relationship between oil operators and the host communities. Such impunity undermines the right to access environmental information and others.

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The National Policy on Environment, Nigeria 'Guiding Principles' (1999) para 1.5
<http://www.environment.gov.ng/index.php/downloads/6-national-policy-on-environment> accessed 4 August 2015.

71

The National Policy on Environment (n 70) 7.

72

Federal Ministry of Environment, General Report for the 9th National Council on Environment, Themed 'Green Economy-A Panacea for Sustainable Development' 5th – 10th May 2013 (Memo No. 10: FMENV/9TH/NCE/STATE/BAY/EA&R/010) p16.

73

Federal Ministry of Environment, General Report (n 72).

4.3.2 Education in Environmental Matters

Looking at the challenges encountered in accessing environmental information from oil operators and government agencies, it is expedient to explore other feasible means to ensure that environmental information gets to the hinterland, particularly host communities to oil and gas activities. It is observed that inculcating and strengthening significant information relating to issues of oil and gas pollution in both primary, secondary and tertiary institutions, would produce better results than some of the statutory means mentioned earlier. It is in this regard that principle 19 of the Stockholm Declaration (1972) affirms the pertinence of education in environmental matters. It provides that:

Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of the environment, but, on the contrary, disseminates information of an educational nature on the need to protect and improve the environment in order to enable man develop in every respect.⁷⁴

The above Declaration is divided into providing education to the masses, particularly the underprivileged on one hand, and an explicit role of the media to disseminate environmental information on the other. Whilst the latter is silent on whose duty it is to provide environmental education, it could be assumed that such burden will be shared by government and major industries.

4.4 Public Participation in Environmental Decision-Making

Bell and others have pointed out that public participation consists of attempts to influence law, policies, and individual decisions made by governmental or regulatory bodies.⁷⁵ Public participation in environmental decision making could take different forms and it entails having access to understand, evaluate, formulate, comment on proposals, plans, and programmes.⁷⁶ Logically, an active provision of environmental information by government or

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Stockholm Declaration (n 1).

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Bell and others (n 21) 334.

⁷⁶

ibid.

regulatory authorities would create conducive atmosphere for public participation in environmental decision-making. For instance, the consultation process during EIAs would entail deliberative participation and exchange of information which will influence the outcomes of laws and policies.

It is maintained that public participation in decision making could be direct or indirect. It is direct where a platform is established for deliberation with members of the public, and as a result, governments sought for direct opinions or inputs from the public regarding environmental issues. On the other hand, public participation is indirect where members of the public utilise their constitutional or statutory rights to express opinions on environmental matters through the platform of the media or press. Section 22 of the Nigerian Constitution, under the Fundamental Objectives and Directive Principles of State Policy, provides that:

The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the government to the people.⁷⁷

The aforesaid provision falls within Part II of the Nigerian Constitution which is non-justiciable by virtue of section 6(6)(c). Notwithstanding, being a 'directive' from the Constitution, which is the grundnorm, the above section 22 would hold sway in a democratic society. Furthermore, section 39 of the Nigerian Constitution guarantees a fundamental right to freedom of expression and the press; stating that every person shall be entitled to freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference. This clearly indicates that inhabitants of a particularly harmed environment are legally empowered to make, receive and impart ideas which would form the basis of any government decision. However, Wolf and Stanley have highlighted a challenge encountered in public decision making; noting that where there are consultations in events of environmental risks, it is more likely that only major landholders and businesses make inputs into developmental plans with a view to protect their personal interests. Whereas only a minority of the population bothers to master the background detail of any such environmental risk before making inputs.⁷⁸ The aforesaid scenario could be playing out in many jurisdictions where there are public consultations.

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⁷⁸ Constitution of the Federal Republic of Nigeria 1999 (as amended).

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Susan Wolf and Neil Stanley, *Wolf and Stanley on Environmental Law* (4th edn, Cavendish Publishing

Public participation in environmental decision making becomes imperative not only for successful policies by the government but ensuring that such policies are backed with the people's mandate; thereby ensuring, that policies are generally acceptable by the masses. In this vein, Stanley and Wolf posited that government's failure to consult properly can wrong-foot the government and lead to a public outcry which may lead the government to have a rethink on its policies.⁷⁹

The National Policy on Environment in Nigeria recognises the principle of participation which requires that decisions should, as much as possible, be made by the people or on their behalf by representatives chosen by them.⁸⁰ This principle would be useful and constructive in addressing the many challenges of environmental pollution in the Niger Delta region in Nigeria. This is because many cases of environmental rights violations would be curbed if the victims are given open doors to directly participate in environmental decision making by both government and oil transnational corporations. Whilst it is clear that the National Policy on the Environment is critical in defining a framework for environmental governance in Nigeria, it is a document without legal force. It is stated that the right to a healthy environment would inevitably include a right to gain public awareness, which public participation is a vital element. There is no direct enforceable right under the Nigerian Constitution in this regard, but the African Charter on Human and People's Rights which is now a municipal law in Nigeria is potentially instructive and useful. Article 13 of the Charter provides that:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. Every citizen shall have the right of equal access to the public service of his country.⁸¹

The above provision of the Charter, being an enforceable provision, can be invoked alongside the right to access environmental information as mentioned above against government agencies entrusted with the duty to safeguard the environment. In fact, it is clear that Article

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Wolf and Stanley (n 78).

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The National Policy on Environment, Nigeria 'Guiding Principles' (n 70) 6.

⁸¹

African Charter (n 68) Article XIII (1 and 2).

13 of the African Charter acts in line with the guiding principle on *Participation* as captured in the National Policy on the Environment. Both, are in support of members of the public, either individually or through chosen representatives to take part in public decision making. It is therefore necessary that government and TNCs, particularly in oil producing areas initiate environmental sensitization programmes with a view to engaging local inhabitants and getting comments on areas of concern. These challenges or areas of concern could be inculcated into environmental policies across major institutions including the environmental policies of oil operators.

The Shell Petroleum Developing Company of Nigeria (SPDC) indicated its deployment of the Global Memorandum of Understanding (GMOU) on its website. This is an agreement between SPDC and a cluster of several oil producing communities with representatives of State, local governments and non-profit organisations. The aforesaid bodies, through representatives, meet as a decision making-committee called the Cluster Development Board (CDB) where communities are given the chance to air their views and the development they want.⁸² Whilst this initiative would be considered as an aspect of corporate social responsibility, it is clearly in conformity with the Principle of *Participation* enshrined in the National Policy on Environment and Article 13 of the African Charter as mentioned (right of equal access to public service). The Principle of *Participation* requires that ‘decisions should, as much as possible, be made by the people or on their behalf by representatives chosen by them’.⁸³

Almost all major oil companies in Nigeria maintain policies connected to the GMOU, but whether such community based meetings and consultations are regular and effective is another matter, since there are frequent complaints of environmental degradation via oil spills with little or no sign of responsibility on the part of the companies.⁸⁴

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Shell Nigeria, ‘Shell in the Community’ <<http://www.shell.com.ng/environment-society/shell-in-the-society/gmou.html>> accessed 5 August 2015.

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⁸⁴ The National Policy on the Environment, Nigeria ‘Guiding Principles’ (n 70) para 1.5 (9).

Human Rights Watch, Nigeria: No Democratic Dividend for Oil Delta (October 22, 2002)

Furthermore, it is shown that during oil spill incidents, a team, including relevant government agencies and the Company owning the flowlines, alongside representatives of impacted communities visit the affected site. This is otherwise known as the Joint Inspection Visit.⁸⁵ Again this initiative is in conformity with principles of Public Participation, since the affected communities are directly given the opportunity via its representatives to take part in the inspection, thereby creating the avenue to receive opinions and make decisions in addressing spills.

Notwithstanding the existing policy measures and other steps taken by the oil TNCs, it has been observed that discriminatory policies that exclude the affected local communities from participating in making rules that govern key aspects of the lives of local inhabitants is one of many other factors instigating crisis in the Niger Delta region.⁸⁶ This position is affirmed by Kalu who posits that addressing the problems in the Niger Delta region in Nigeria requires a multidimensional measures including ‘public or indigenous participation’ in mining energy and other resources development.⁸⁷ In essence, the major challenges within the oil regions would not merely be resolved by public participation in decision making but also in public participation in managing the resources. In light of what has been said, it is imperative to point out that the demands and of oil producing communities in the Niger Delta for consultations and inclusion in policy making processes relating to matters that affect the environment and resources is not is not out of place⁸⁸ due to both municipal and international recognition of the need for public participation in environmental matters.

4.5 Access to Environmental Justice

Access to environmental justice is a crucial aspect or pillar of public awareness as a tool for dealing with environmental problems. This is pursuant to the fact that issues of fundamental

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Shell Nigeria, ‘Environment and Society-How we Respond to Spills’ Available at <http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html> accessed 5 August 2015.

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Nwapi Chilenye, ‘Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria’ (2010) 54 J Afr L 184.

⁸⁷

Victoria E Kalu, ‘State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria’ (2008) 26 JENRL 418, 423-424.

⁸⁸

Kalu (n 88) 435.

rights enforcement, forming the centre-point of this research would be insignificant and meaningless if individuals are unable to access justice in the courts or related institutions mandated with resolving environmental disputes by law. The imperative for adequate access to environmental justice has been a global call. The Aarhus Convention, despite being a Regional Convention for Europe, took into cognisance, as stated in its Preamble. Principle 1 of the Stockholm Declaration as well as Principle 10 of the Rio Declaration as discussed above emphasised on the fundamental rights to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing as well as Effective access to judicial and administrative proceedings respectively. The Convention mandates Member States to ensure that individuals who are refused access to environmental information are given access to a review procedure before a Court of law or other independent and impartial bodies established by law.⁸⁹ In the same manner, the Freedom of Information Act, 2011 in Nigeria is explicit on the appropriate step an applicant should follow where access to information is denied. It states that:

Where the government or public institution fails to give access to a record or information applied for under this Act, or a part thereof, the institution shall state in the notice given to the applicant the grounds for the refusal, the specific provision of this Act that it relates to and that the applicant has a right to challenge the decision refusing access and have it reviewed by a Court.⁹⁰

Article 9 of the Aarhus Convention provides that:

...Each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.⁹¹

The Convention equally supports the provision of adequate and effective injunctive reliefs as well as creating mechanisms to remove or reduce financial and other barriers to access justice.⁹² The Aarhus Convention becomes a very relevant international reference document

⁸⁹

Aarhus Convention (n 3), art 4 (1).

⁹⁰

Freedom of Information Act 2011 N0.4, s 7.

⁹¹

Aarhus Convention (n 3), art 9 (3).

⁹²

in this regard due to the fact that it solely addresses issues relating to the three key aspects of public participation, which includes access to justice, in full.

It is submitted that access to justice in events of environmental rights violation is contingent upon the intersection of the breach of substantive and procedural rights. Amechi had maintained that the latter is very important as most people whose rights have been infringed or threatened by environmental degradation in Nigeria have been denied access to justice because of the burdensome procedural rules or injustices encountered in the legal system.⁹³ He drew an instance, stating that failure to discharge the onerous burden of proof associated with reliance on tort rules has led to the failure of many environmental cases.⁹⁴

In the same vein, the substantive application of traditional principles of liability in environmental pollution cases, such as the strict liability rule, torts of nuisance and negligence are vague and/or difficult to establish, and this, to a large is a barrier to accessing environmental justice. In view of these shortcomings, Kalu and Stewart have stated that:

Litigation in regular courts has not helped the situation. This is primarily because the highly scientific, technical and sophisticated nature of the operations of oil companies makes it imperative for a plaintiff to be well versed in this area to be able to recover damages for his losses in suits for compensation or negligence.⁹⁵

In Nigeria, the financial burden and time involved in running environmental litigation are considered as some of the primary challenges facing the successful pursuit of environmental cases; and in some cases, allegations of judicial compromise instigated by TNCs may be a considerable factor hindering environmental justice. Although this latter position runs short of conclusive evidence, it is a widely held belief amongst victims and litigants of environmental pollution in Nigeria.⁹⁶

Aarhus Convention (n 3), art 9 (4) and (5).

⁹³

Emeka P Amechi, 'Litigating Right To Healthy Environment In Nigeria: An Examination Of The Impacts Of The Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access To Justice For Victims Of Environmental Degradation' (2010) 6 Law, Environment & Development Journal 320, 323.

⁹⁴

ibid.

⁹⁵

Victoria E Kalu and Ngozi F Stewart, 'Nigeria's Niger Delta Crises and Resolution of Oil and Gas

⁹⁶

In light of the above, there are different circumstances or categories under which members of the public can institute judicial proceedings within the parameters of the right of access to environmental justice. In line with Article 9 of the Aarhus Convention, anyone who considers that his/her right to information access is ignored, wrongfully refused, inadequately answered, or otherwise not dealt with in accordance with stipulated laws or guidelines would be entitled to access justice by way of judicial review.⁹⁷ This provision is similar to section 7 of the Freedom of Information Act in Nigeria mandating applicants to challenge any decision refusing access to information with a view to having it reviewed by a court. Second, judicial actions may be invoked by ‘members of the public concerned’ where decisions, acts or omissions relating to specific permits for peculiar sort of activities (mostly projects with tendencies to significantly impact on the environment) are found to or likely to contravene existing laws or regulations.⁹⁸ The Aarhus Convention defined the ‘Public Concerned’ to include Non-Governmental Organizations promoting environmental protection and meeting any requirements under national law. In this vein, it is maintained that NGOs are deemed to have a specific interest in environmental matters and decision making,⁹⁹ and could therefore have access to justice in the same circumstances with natural persons.

In Nigeria, under the Freedom of Information Act 2011, ‘applicant’ refers to any person who applies for information (environmental information within the context of this discussion) under the Act,¹⁰⁰ and ‘person’ includes a corporation sole and body of persons whether corporate or incorporate; acting individually or as a group.¹⁰¹ It follows that NGOs are at will to request environmental information, even without the need to demonstrate any specific

Eghosa O Ekhator, ‘Improving Access to Environmental Justice under the African Charter on Human and People’s Rights: The Roles of NGOs in Nigeria’ (2014) 22 AJICL 63.

⁹⁷

Aarhus Convention (n 3) Article 9(1).

⁹⁸

Jonas Ebbesson, ‘The Aarhus Convention, Access to Justice and Compliance by the UK’ (2013) 24 (2/3) ELM 56, 57.

⁹⁹

¹⁰⁰ *ibid.*

Freedom of Information Act (n 90), s 31.

¹⁰¹

ibid.

interest in the information being applied for,¹⁰² as against the requirement for proof of interest in the Aarhus Convention as mentioned.¹⁰³ As a result, any person entitled to environmental information shall have the right to institute legal proceedings to compel any public institution to comply where it is shown that such right is infringed.¹⁰⁴

It has been shown in the previous chapters that the fundamental rights to life and dignity of the human person as enshrined in the Nigerian Constitution have been creatively interpreted to include environmental rights.¹⁰⁵ Also, there are supplementary provisions relating to the right to a clean environment which have been captured in the African Charter.¹⁰⁶ A cumulative reading from both the Constitution and the African Charter shows that environmental rights in Nigeria are enforceable, and these rights are enforced via the Fundamental Rights (Enforcement Procedure) Rules 2009¹⁰⁷ (hereinafter ‘the rules’ or ‘FREP rules’). Under the Rules, an ‘Applicant’ is defined as a party who files an application or on whose behalf, an application is filed under the rules.¹⁰⁸ This indicates that no leave of court is required to institute a class action or action on behalf of another as against provisions of the former Rules of 1979 which abhors the receipt of an application for an order enforcing or securing the enforcement of any fundamental rights without being granted leave by the court.¹⁰⁹

102

Freedom of Information Act (n 90), s 1(2).

103

Aarhus Convention (n 3) Article 2(5). This provision requires that concerned citizens would be able to access environmental justice where sufficient interest is shown.

104

Freedom of Information Act (n 90), s 1(3).

105

Jonah Gbemre (for himself and as representing Iwherekana Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd and others [2005] AHRLR 151 (Federal High Court).

106

These provisions are adequately discussed in chapter 6 of this thesis.

107

Fundamental Rights (Enforcement Procedure) Rules 2009.

108

ibid, Ord I, r 2.

109

FREP Rules, 1979.

Again, the new Fundamental Rights (Enforcement Procedure) Rules 2009, has totally expunged any form of limitation of action imposed by any limitation statute.¹¹⁰ It is pertinent to mention that in the former Rules of 1979, no leave was granted for an enforcement of fundamental rights except such application is brought within twelve months from the date of the happening of the event, matter or act complained, except where such delay is satisfactorily justified.¹¹¹ In the light of these changes and improvements in the current Rules (2009), there is no doubt that the pursuit for environmental justice has gained momentum since it could be seen that limitation of statutes and seeking leave of court before instituting legal proceedings are major technical hurdles in the realm of judicial proceedings. In the Nigerian case of *Okpara v Shell Petroleum Development Company Nigeria Ltd & others*,¹¹² the Federal High Court, struck out a matter brought under the Fundamental Rights (Enforcement Procedures) Rules of 1979 (the old Rules) for enforcement of environmental rights, on the ground that the suit could not be maintained in a representative capacity. Some of the key hurdles in the quest for environmental justice as highlighted by Ekhaton includes weak regulatory regime in the oil and gas sector, the lack of political will by regulatory agencies to enforce oil and gas laws and regulations, acute corruption and judicial obstacles.¹¹³ It has been shown from previous chapters that the Nigerian environmental legal framework is rich in terms of holding environmental polluters liable, but it is submitted that the aforementioned factors ranging from the lack of political will by regulatory agencies to enforce oil and gas laws to judicial obstacles are understandable owing to the interest or economic benefits which the State derives from oil and gas production.¹¹⁴

110

FREP Rules 2009 Ord III, r 1.

111

FREP Rules 1979 Ord II, r 1.

112

Suit No. FHC/PH/CS518/2005 Unreported decision of the Federal High Court, Port Harcourt Division, 29 September 2006.

113

Ekhaton (n 96).

114

Factors relating to bottlenecks in achieving environmental justice are adequately discussed in chapter 3

4.5.1 Access to Environmental Justice and Jurisdiction of Courts in Nigeria

Another critical factor in the pursuit for environmental justice is the proximity of the Nigerian Courts to those prone to the negative impacts of environmental pollution caused by oil and gas activities of multinationals. Under section 251(1)(n) of the Nigerian Constitution it is provided that the Federal High Court shall have and exercise exclusive jurisdiction in civil causes and matters relating to mines and minerals (including oil fields, oil mining, geological surveys and natural gas). This is an issue capable of raising eyebrows owing to the fact that there are limited Federal High Court Divisions in the country compared to the existing State High Courts¹¹⁵ which are almost located in every local government area in Nigeria. There is no gainsaying that limited number of courts in Nigeria is a reason for congestion of cases which inevitably leads to delay in justice as well as projecting challenges in the access to justice.

In *Shell Petroleum Development Company of Nigeria Ltd v Abel Isaiah and others*,¹¹⁶ the Supreme Court of Nigeria reinforced the stance that a State High Court lacks jurisdiction to entertain issues on petroleum mining operations which includes environmental pollution caused by oil and gas activities. In that case, the plaintiffs (now respondents) brought a claim under the common law principles of negligence and *Rylands v Fletcher* for compensation for the permanent damage to its plant, marine and domestic life which was caused by the defendants' (now appellant) oil exploration activities in Rivers State, Nigeria. The State High Court (trial court) delivered judgment in favour of the plaintiffs; which was affirmed by the Court of Appeal. Dissatisfied with both judgments, the appellant approached the Supreme Court. The primary issue for determination before the Supreme Court was whether the Court of Appeal was right in holding that the State High Court had jurisdiction to try the case. Whilst allowing the appeal, the Supreme Court agreed that the subject matter of the respondents' claim (compensation for oil spillage) falls within the exclusive jurisdiction of the Federal High Court as contained in section 251(1)(n) of the Nigerian Constitution as

¹¹⁵

State High Courts by Virtue of section 6(3) of the Constitution of the Federal Republic of Nigeria 1999 (with amendments) are superior courts of record.

¹¹⁶

[2001] 2 NWLR (Pt 723) 168 (SC).

stated above.¹¹⁷ In linking mining operations to the laying of oil pipelines, the Supreme Court stated:

In establishing whether the construction and maintenance of an oil pipeline is part of mining operations, it is relevant to refer to the practice of the oil prospecting licence holders during mining operations. They have been described in the Petroleum Act 1960 and Oil Pipelines Act 1956. If petroleum is discovered through the approved mining operations, arrangement is made by the oil prospecting licence holder, which struck the oil, to evacuate the oil from the oil well to an oil terminal. This is done either through a pipeline or a tanker. The pipeline is constructed and maintained by the Oil Company which transports the oil from the oil-well to the oil terminal.¹¹⁸

The above stance of the Supreme Court on the exercise of exclusive jurisdiction on proceedings relating to oil exploitation activities by the Federal High Court was subsequently affirmed by the Court of Appeal in the case of *Shell Petroleum Development Company of Nigeria Ltd v Sirpi-Alusteel Construction Ltd*.¹¹⁹ Although, before the emergence of these latter cases it has been the reasoning that incidents of environmental pollution caused by leakages from oil pipelines do not fall within the meaning of ‘mines and minerals’.¹²⁰ Looking at the provision of section 251 of the Nigerian Constitution on the exclusive jurisdiction of the Federal High Court on mines and minerals, it would be logical to conclude that causes of action arising in environmental pollution, which basically are side effects of oil mining and natural activities of oil TNCs are limited to resolution by the Federal High Court. Conversely, Section 46(1) of the Constitution¹²¹ which borders on the enforcement of Fundamental Rights, captured in Chapter IV provides that:

Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress.¹²²

¹¹⁷

SPDC Nigeria v Abel Isaiah (n 116).

¹¹⁸

SPDC Nigeria v Abel Isaiah (n 116) 178-179.

¹¹⁹

[2008] 1 NWLR (Pt 1067) 128 at 148 (CA)

¹²⁰

Shell Petroleum Development Company of Nigeria Ltd v Abel Isaiah and Others [1997] 6 NWLR (Pt

¹²¹

Nigerian Constitution (n 77), s 46 (1).

¹²²

The above provision is furthermore buttressed by section 46(2) on the original jurisdiction of State High Courts to entertain proceedings in the event of violations of Fundamental Rights (which inevitably include the right to safe environment) enforcement. It states that:

Subject to the provisions of this Constitution, a High Court shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcement or securing the enforcing within that State of any right to which the person who makes the application may be entitled under this chapter.¹²³

In the light of the above, it is observed that the provisions of sections 251(1) (n) and 46(1) and (2) of the Constitution are contradictory with regard to the jurisdiction of Courts in entertaining issues relating to mining and mineral. This becomes more obvious owing to the trend of the recognition and interpretation of the rights to life and dignity of the human person to include environmental rights as maintained in the case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd.*¹²⁴ Again, bearing in mind, the provisions of environmental safeguards as contained in the African Charter, which can be enforced via the Fundamental Rights Enforcement Procedure Rules, it is clear that State High Courts retain jurisdiction to entertain issues of environmental pollution raised via Fundamental Rights Enforcement Proceedings. This latter stance is backed by Order 1 Rule 2 of the Rules (2009) which defines ‘Court’ to mean ‘the Federal High Court or the High Court of a State or the High Court of the Federal Capital Territory, Abuja’.

In view of the foregoing, it is noteworthy that whilst the side-note of section 46(1) is couched ‘Special Jurisdiction of High Court’, that of section 251(1)(n) (bordering on exclusive jurisdiction of the Federal High Court) is marked ‘Jurisdiction’, implying ‘general jurisdiction’. In this regard, Uwaifo JSC in *Grace Jack v University of Agriculture, Markurdi*,¹²⁵ maintained that where there are ‘special’ and ‘general’ provisions in a statute

ibid.

¹²³

Nigerian Constitution (n 77), s 46 (2).

¹²⁴

Jonah Gbemre’s case (n 105).

¹²⁵

[2004] 5 NWLR (Pt 865) 208 at 228-229.

covering the same subject matter, the general provision is not to be interpreted as derogating what has been specifically provided for. In view of this, Uwaifo affirmed the provision of section 46(1) as ‘special and fundamental.’¹²⁶ It is maintained that in invoking fundamental rights incorporated in the Constitution, an applicant is at liberty to pursue such action either at a State High Court, Federal High Court situated in the State where the alleged infringement had occurred or the High Court of the Federal Capital territory. This is because, section 46(1) had limited the institution of all actions emanating under Chapter IV to a High Court in the State of the Applicant.

It could be argued, therefore, that the Nigerian Supreme Court Judgment in *Abel Isaiah’s* case¹²⁷ above did not in any way invalidate commencement of fundamental rights actions in cases of oil and gas pollution in a State High Court since the subject matter in that case (*Abel Isaiah*) borders on common law tort principles of negligence and strict liability and not fundamental rights enforcement. In the case of *Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd*,¹²⁸ which was a group litigation involving more than 15,000 claimants seeking damages at common law and statutory compensation under Nigerian law in a London High Court in relation to oil spills alleged to have been caused by Shell Petroleum Development Company of Nigeria (SPDC), the court affirmed that...’the Federal High Court has exclusive jurisdiction to deal not only with any cases at common law but also any claim for statutory compensation under the Oil Pipelines Act’.¹²⁹ From the foregoing argument, it is submitted that in the absence of fundamental rights enforcement, it is plausible that the Federal High Court retains exclusive jurisdiction to entertain oil pollution matters arising from mines and minerals.¹³⁰

¹²⁶

ibid.

¹²⁷

Abel Isaiah (n 116).

¹²⁸

[2014] EWHC 1973 (TCC).

¹²⁹

The Bodo Case (n 128) [48].

¹³⁰

See Engobo Emeseh, ‘Mainstreaming enforcement for the victims of environmental pollution: towards effective allocation of legislative competence under a federal constitution’ (2012) 14 ELR 185, 196-197 on a

The Supreme Court in *Nwankwo v Yar' adua*¹³¹ reinforced the conditions precedent to the important issue of jurisdiction, which include the fact that a court is only competent to exercise jurisdiction in respect of any matter where the subject matter of the case is within its jurisdiction and there is no feature in the case which would prevent the court from exercising jurisdiction. It follows, that an applicant carries a substantive burden of establishing the nexus between environmental pollution and infringement of fundamental rights as encapsulated in the Constitution and the African Charter which forms the heart of this research.

4.6 Conclusions

This chapter briefly considered the concept of 'public awareness' in environmental matters with a view to establishing its relevance to the principle of the protection of the environment within the ambit of environmental rights (the right to a safe and pollution free environment). It is practically a dialectic, owing to current environmental challenges posed by activities of oil TNCs on the immediate environment. In addressing pollution challenges, public participation becomes a tool which must be given higher priority and credence. In light of this, it is maintained that in order to meaningfully contribute to the protection of the right of every person; of both present and future generations to live in an environment suitable for the well-being of humans, governments must guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters.

In the current Nigerian legal framework, the Freedom of Information and the Environmental Impact Assessment Acts have been identified as supporting legal instruments in the promotion of principles of public awareness. In the same vein, the National Policy on Environment, though precatory in nature, has affirmed core principles of public awareness. It is submitted that public awareness, in every aspect, if adequately promoted, will stimulate a proper understanding of environmental challenges and aid in fundamental rights enforcement.

The next chapter considers the principles of environmental protection and the concept of state responsibility; and critically examines the interconnectedness between principles of liability at both state and international levels, and also considers the nature of such liability.

brief analysis on the jurisdiction of courts regarding oil mining.

131

[2010] 12 NWLR (Pt 1209) 518 at 560.

CHAPTER 5

PROTECTION AND PRESERVATION OF THE ENVIRONMENT AND THE PRINCIPLE OF STATE RESPONSIBILITY

5.1 Introduction

There are intricacies surrounding principles of causation and responsibility in relation to environmental pollution incidents. Owing to these challenges, many international conventions and treaties have put more effort towards setting a uniform standard for liability in cases of environmental hazards resulting to loss or damage. This chapter briefly considers the extent of environmental pollution in Nigeria, caused, particularly as a result of oil and gas exploration and production by transnational corporations (TNCs) and focusses on the principle of environmental protection and the standard of liability obtainable with regard to the principle of state responsibility, within Nigeria and at the international level. This two-fold approach of the concept of state responsibility is triggered on the basis that whilst a state is expected to tackle pollution issues within its jurisdiction, a responsible state is under international obligation not to cause harm to other states. This principle was emphasised in the *Trail Smelter Arbitration*¹ in 1938. It is worth noting that the discussion in this chapter is targeted towards ascertaining the prevailing measure of liability that is obtainable for transboundary pollution, with a view to comparing such liability with that obtainable in breach of fundamental rights to a safe environment as discussed in chapter 6. Basically, this chapter does not necessarily tackle in-depth issues on the concept of state responsibility.

The crux of this chapter is to critically examine the interplay of national and international laws with a view to ascertaining the measure of liability obtainable in legal proceedings relating to environmental pollution. This is done in line with pragmatic cases of environmental abuses and the attitude of the courts in resolving such disputes. More importantly, the current analysis is aimed at resolving one of the hypotheses, done in part, in chapter 1 of this research which is to examine ‘whether the current technique of measuring liability, particularly under tort law is clear in Nigeria’.

1

¹ Trail Smelter Arbitration (United States/Canada), (1938) Vol III (Reports of International Arbitral Awards) 1905-1982.

Whilst considering principles of transnational responsibility, this research enumerates on the mandate of the Stockholm Declaration² and other related instruments on the need for states to take responsibility by ensuring that activities within their jurisdiction and control do not cause damage outside of their jurisdiction.³ A similar obligation is reflected in principle 2 of the Rio Declaration.⁴ In addition, where damage occurs due to activities of states, the Stockholm Declaration requires that states do cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdictions.⁵ This chapter corroborates the fact that questions of liability and compensation for environmental harms have undergone dramatic doctrinal development in municipal legal systems, while international law remained essentially static.⁶ It is observed that the International Court of Justice anchored the standard of liability relating to transboundary harm on ‘prevention and due diligence’ even where damage is foreseeable by the defaulting state. This is more particularly displayed in the case of *Argentina v Uruguay*.⁷ Conversely, it is argued that once damage is foreseeable, liability ought to be strict or absolute, provided there was no third party interference as shown in the case of *Rylands v Fletcher*.⁸ Owing to this, the ‘due diligence’ requirement in the case of *Donoghue v*

2

Declaration of the United Nations Conference on the Human Environment (adopted 5-6 June 1972) (hereinafter ‘Stockholm Declaration’).

3

See principle 21 of the Stockholm Declaration (n 2).

4

United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) A/CONF. 151/26 Vol.1, Principle 2.

5

Stockholm Declaration (n 2), principle 22.

6

Sanford E Gaines, ‘International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?’ (1989) 30 HILJ 311, 315.

7

Pulp Mills on the River Uruguay (*Argentina v Uruguay*) (Merits) [2010] ICJ Rep14, para 101.

8

*Stevenson*⁹ is argued to no longer sustain current liability principles under state responsibility, particularly where it is shown that the damage caused by a state to another is foreseeable.

Principle 13 of the Rio Declaration¹⁰ and Principle 22 of the Stockholm Declaration, mandates states to develop national and international law regarding liability and compensation of victims of pollution. Hence, this chapter concentrates on the examination of liability principles with regards to extant environmental laws in Nigeria and case law in drawing a logical legal stance on the position of both international and domestic law regarding the standard of liability in environmental pollution incidents. Nevertheless, it is maintained that failure of a state to provide reasonable redress to victims of environmental pollution may, in most serious cases lead to the violation of fundamental rights to life, private life, health and property under international human rights agreements.¹¹ It follows that the analysis of traditional liability principles (such as statutory provisions and common law rules of negligence, nuisance and strict liability) as discussed in the current chapter would serve the purpose of a further comparative analysis of such measures of liability with that obtainable in cases relating to breach of fundamental rights to a healthy environment as discussed in chapter 6.

5.2 A Brief Analysis on Environmental Pollution incidents in Nigeria.

There is no gainsaying that what has created for Nigeria the strength and popularity for enormous prosperity and regional leadership in the world and Africa in particular is its oil reserves. Disturbingly, the continuous exploration and production of crude oil in Nigeria, particularly in the Niger Delta area has resulted in serious environmental hazards. In affirming this latter position, Olanrewaju maintained that:

Almost every ecosystem and primal culture that has had the misfortune of being exposed to oil exploration and production has been disrupted and in some cases suffer irreversible ruin. Mention can be made of the

[1861-73] All ER Rep 1 (HL). See also figure 1.3 on the nature and scope of the strict liability rule.

9

[1932] AC 562 (HL) 580.

10

Rio Declaration (n 4).

11

See the cases of *Lopez Ostra v Spain* [1994] 20 EHRR 277 and *Guerra v Italy* [1998] 26 EHRR 357 as discussed in figure 2.3 of this research.

destruction of several mangrove forests, associated species extinction, the destruction of complex animal communities, the poisoning of water supplies, the displacement of many indigenous populations and the killing of protesters from both non-oil and host oil communities who are averse to the continued pollution and degradation.¹²

The above consequences associated with oil and gas exploration and production evinced by Olanrewaju is a reflection of what is being experienced by inhabitants of oil producing communities in most developing countries. This is equally the case in developed countries, but could be seen to be in its miniature due to urgent and commensurate response to cases of oil spillage and other associated activities that could lead to more severe environmental harm.

Most cases of environmental pollution in Nigeria resulting from oil and gas exploration and production are traced to the Niger Delta area. The Niger Delta is located in the South-South region of Nigeria and made up of States such as Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Ondo and Rivers. Oil exploration in the Niger Delta could be traced to 1905 when oil was discovered in Araromi; now in Ondo state.¹³ This discovery is said to attract many companies to Nigeria. The major discovery of oil in commercial quantity in Nigeria was after the Second World War in 1956, which is traceable to Shell Bp in Oloibiri Community in Ogbia Local Government Area of Bayelsa State.

As mentioned earlier, there are increasing cases of environmental degradation¹⁴ owing to pollution caused by oil activities. The major source of pollution in Nigeria is oil spillage and gas flaring.¹⁵ Oil spillages in Nigeria are basically traceable to sabotage on oil pipelines and illegal oil refining. Gas flaring, in some cases, occurs as a result of sabotage or unintentional damage on gas pipelines, and the gas flaring technique used in oil production to separate

¹²

Olanrewaju Fagbohun, *The Law of Oil Pollution and Environmental Restoration A Comparative Review* (Odade, Lagos 2010) 3.

¹³

The State of Human Rights in Nigeria, Being a Report on the State of Human Rights in Nigeria, 2008 (Nigerian National Human Rights Commission, Abuja 2008) 199-200.

¹⁴

Olanrewaju has highlighted some of the negative traits associated with oil and gas exploration and production in his book (n 12).

¹⁵

A Report on the state of Human Rights in Nigeria (n 13).

crude from associated gases. The aforesaid gas extraction method is considered outdated and it has caused extensive damage to surface vegetation, agriculture, human health and aquatic life.¹⁶

The report on the environment and the Niger Delta by the National Human Rights Commission has it to the effect that in 1979, the Nigerian government passed a law banning gas flaring but the ministry of petroleum was allowed by virtue of the law to grant exceptions, and that up till date, most operators are still relying on the exceptions.¹⁷ The Nigerian government had previously given 2003 and 2004 as deadlines to end gas flaring but there was no consistent compliance due to the fact that there is no legislation to that effect,¹⁸ hence, it became a mere directive without sanctions.

There are series of incidents on hazardous oil spillage and gas flaring in the Niger Delta Area.¹⁹ Of recent, with environmental and legal significance, is the oil spill from Shell pipelines in Bodo community which is reported to have adversely affected about 15,600 farmers and fishermen in 2008 and 2009.²⁰ But it seems that pollution emanating from the crude oil exploration and production is inevitable, and this is widely associated to the multi-dimensional causes of oil pollution which ranges from oil well blow-outs, corrosion of pipelines and tanks, burst and leaking pipelines, over pressure failures, over-flow of process equipment components, failures along pump discharge manifolds, sabotage to well heads and flow lines etc. Whilst enumerating on the probable causes of oil pollution, Fagbohun posits that:

¹⁶

ibid.

¹⁷

A Report on the state of Human Rights in Nigeria (n 13).

¹⁸

A Report on the state of Human Rights in Nigeria (n 13) 201.

¹⁹

For a breakdown of oil spills incidents in Nigeria from 1976-1997, see Olanrewaju Fagbohun, *The Law of Oil Pollution and Environmental Restoration, A comparative Review* (n 12) on page 164.

²⁰

John Vidal, 'Shell announces £55m payout for Nigeria Oil spills' *The guardian* (London 7 January 2015) <<https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>> accessed 14 August 2015.

Corrosion of pipes and the rupturing or leaking of production infrastructure accounts for about 50 per cent of oil spills. The reason for this is that many of these facilities are old and lack regular inspection and maintenance.²¹

Despite the above stance linking the major cause of oil spillage to ‘corrosion of pipes’, there seems to be a major disagreement amongst environmental activists, stakeholders and operators on the most likely cause of oil spillage. Whilst most victims and environmental activists are more inclined to retain the view that oil and gas pipelines are inadequately inspected and maintained thereby resulting in spillages, oil TNCs are mostly of the view that spillages are caused via sabotage. The Director of Global Issue at Amnesty International, Audrey Gaughram, whilst responding to the recent acceptance by Shell BP to compensate the indigenes of Bodo community with £55m due to a manifest devastation caused to the people, said: ‘Oil pollution in the Niger Delta is one of the biggest corporate scandals of our time. Shell needs to provide proper compensation, clear up the mess and make the pipelines safer’.²² Conversely, Mutiu Sunmonu, Managing Director of Shell Petroleum Development Company of Nigeria (SPDC), whilst responding to the same Bodo incidence, maintained that:

...Unless real action is taken to end the scourge of oil theft and illegal refining, which remains the main cause of environmental pollution and is the real tragedy of the Niger Delta, areas that are cleaned up will simply become re-impacted through these illegal activities.²³

In the light of the above elucidations, it is important to mention that the latter view of Sunmonu, linking the basic causes of environmental pollution to cases of oil theft and illegal refining must not be taken on face value as there are constant cases of oil theft resulting to oil spillages. Having said so, TNCs would have to show more vigilance and diligence in tackling cases of oil spillages, since it has become obvious that oil pollution is an inevitable consequence of oil and gas exploration and production.

²¹

Fagbohun (n 12).

²²

Vidal (n 20).

²³

Vidal (n 20).

5.3 The Nigerian Legal Framework and Issues of Environmental Responsibility

The principles relating to environmental liability in the Nigerian Constitution and the African Charter have been discussed in the early part of this research.²⁴ It is mentioned that the only aspect of the Nigerian Constitution which contains an obligation on the part of the state to ensure a pollution free environment is rendered non-justiciable by virtue of the same Constitution.²⁵ However, the courts have given judicial consideration to the fundamental rights to life and dignity of the person as contained in the Nigerian Constitution and the African Charter respectively by interpreting these guaranteed rights to inevitably include the right to clean poison-free environment, pollution free and healthy environment. Albeit there are few judicial decisions in this regard, the courts have put hope on victims of environmental pollution to seek redress via fundamental rights enforcements.²⁶ In the same vein, there is a plethora of legislation relating to environmental liability in cases of oil and gas pollution, and a brief consideration of such laws will aid the understanding of what parties in environmental pollution cases in Nigeria could expect in adjudication.

5.3.1 Harmful Waste (Special Criminal Provisions) Act 2004²⁷

The enactment of the Harmful Waste Act 2004 by the Nigerian National Assembly was in response to the dumping of toxic waste in Koko town, Nigeria.²⁸ The Act prohibits all kinds

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See figure 2.5 of chapter two entitled 'Awareness of Human Rights as a Tool for Environmental Protection in Nigeria'.

²⁵

Section 20 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) implores states to protect and improve the environment. This provision has been rendered unenforceable by virtue of section 6 of the same Constitution.

²⁶

See the case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd and others* [2005] AHRLR 151 (Federal High Court of Nigeria, Benin Judicial Division).

²⁷

Cap H1 LFN 2004.

²⁸

Nelson E Ojukwu-Ogba, 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: much talk, less teeth' (2006) 8/9 IELTR 201, 204.

of dealings relating to the carrying, dumping or depositing of harmful waste in the air, land or waters of Nigeria except with the consent of a lawful authority.²⁹ The Act creates a direct criminal liability on polluters of the environment, particularly as provided in section 6 of the Act which imposes a criminal penalty requiring ‘life imprisonment’ and the seizure of any ‘carrier, including aircraft, vehicle, container and any other thing whatsoever’ used in the transportation of the harmful waste.³⁰

It is clear that section 6 of the Act imposes liability on the polluter but the nature of the liability does not involve any kind of compensation from the polluter, rather, after conviction, polluters are to face a ‘punishment of life imprisonment’ and forfeiture of land or anything which was used to commit the offence. What seems to be relevant from the aforementioned provision is the imposition of liability on the polluters of the environment. In furtherance, section 12 of the Act³¹ has equally defined the civil liability of polluters (offenders) by stating, *inter alia*, that the offender will be liable to persons who have suffered injury from his conduct.³² A close consideration of the section will be necessary to appreciate and interpret the nature of liability involved. It provides that:

Where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contiguous zone or exclusive economic zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped or imported shall be liable for the damage-except where the damage was due wholly to the fault of the person who suffered it; or was suffered by a person who voluntarily accepted the risk thereof.³³

²⁹

Environmental Resource Institute, ‘A Synopsis of Laws and Regulations on the Environment in Nigeria’. <<http://www.elri-ng.org/newsandrelease2.html>> accessed 14 July 2014. See also the introductory section of the Act.

³⁰

Harmful Waste Act (n 27), s 6.

³¹

ibid, s 12.

³²

Environmental Resource Institute (n 29).

³³

Harmful Waste Act (n 27), s 12(1)(a) and (b).

This latter provision has equally established the kind of liability that will attract compensation for damages in favour of anyone who has suffered injury. It is clear that the Act entails both criminal and civil liabilities for the unlawful acts or omissions of the defendant which would inevitably cause injury to others.

The three basic grounds on which the defendant can be exonerated from liability are in events where it is shown that the dumping of the waste is carried out under lawful authority³⁴ or where the damage was as a result of the person who suffered it (claimant), and or where the claimant voluntarily accepted the risk. If the preceding provisions are to be given a literal interpretation, then it presupposes that acts or omissions of a third party, independent of the claimant and defendant (polluter) could also attract the liability of the polluter itself. One major issue for scrutiny is whether liability under the Harmful Waste Act 2004 can be termed as 'strict liability' offences having regard to the basic elements needed to establish a case of strict liability as in *Rylands v Fletcher*.³⁵ It is submitted that liability under the Harmful Waste Act regime is stricter than the liability in *Rylands*. This is because there are few identifiable exceptions under the Act than could be seen in the *Rylands* case.³⁶ Furthermore, the Act is silent as to whether the requirement of 'reasonable foreseeability of harm' as required in establishing strict liability cases would be required as an element for prosecution under the Act. Section 2 of the Act provides that:

A person shall be deemed to commit a crime under this Act if-he actually does the act or makes the omission which constitutes the crime; or he does or omits to do any act for the purpose of enabling or aiding another person to commit the crime.³⁷

The above provision is silent on the measure of liability required to hold polluters culpable under this Act. Rather it is maintained that a person shall be deemed to commit a crime under

³⁴

Harmful Waste Act (n 27), s 1(2).

³⁵

[1861-73] All ER 1 (HL).

³⁶

The exceptions in *Rylands v Fletcher* includes, amongst others; consent of the claimant, act of a stranger, default of the claimant and Act of God.

³⁷

Harmful Waste Act (n 27), s 2(1) (a)(b).

the Act if he ‘actually does the act or makes the omission’ which leads to the offence. In establishing that the accused actually committed a crime, under criminal cases, the prosecution would have to prove beyond reasonable doubt. In this regard, it is argued that liable could not be absolute since there are hurdles in the task of proving beyond reasonable doubt.

The term, ‘Harmful waste’, under the Harmful Waste Act 2004 includes ‘liquid,’³⁸ and the Act, without any doubt is very much applicable in the oil and gas industry considering the fact that there are tremendous wastes which are produced in the course of oil and gas exploration and production, and such wastes can be harmful to the environment.³⁹

5.3.2 Oil in Navigable Waters Act 2004⁴⁰

The Oil in Navigable Waters Act is enacted to eradicate acts of pollution to the Nigerian waters, thereby creating liability on individuals and companies who are found wanting in the contamination of the Nigerian water through the discharge of oil (including fuel, lubricating oil and diesel). The Act was enacted in line with the provisions of the International Convention for the Prevention of Pollution of the Sea by oil 1954 to 1962.⁴¹ A combined reading of sections 1, 3, and 5 of the Act⁴² reveals that the Act imposes liability on polluters who discharges oil, either from a vessel, land or from an apparatus used for transferring oil into prohibited sea areas in Nigeria.

³⁸

Harmful Waste Act (n 27), s 1(3).

³⁹

Ojukwu-Ogba (n 28).

⁴⁰

Cap O6 LFN 2004.

⁴¹

This is clearly stated in the Preamble to the Oil in Navigable Waters Act Cap O6 LFN 2004.

⁴²

Oil in Navigable Waters Act (n 40), sections 1, 3 and 5.

Section 6 of the Oil in Navigable Waters Act⁴³ provides punishment for such polluters of the Nigerian sea, while section 4 of the Act⁴⁴ provides general defences which the defendant (polluter) can raise in matters brought under the Act. One such defence is that of ‘reasonableness’, that is, the Act provides, inter alia, that the polluter must show that the oil escaped in consequence of damage to the vessel, and that as soon as practicable after the occurrence of the damage all reasonable steps were taken for preventing, or if the escape could not be prevented, then reasonable steps should have been taken to stop or reduce the escape of oil.⁴⁵ This defence appears to be equated to the general common law defence in the torts of strict liability (*Rylands v Fletcher*), nuisance, trespass to land and negligence. A further defence which is made available for a defendant under the Act is that the defendant will have to show that ‘the leakage was not due to any want of reasonable care.’⁴⁶ This latter defence relating to the exercise of reasonable care on the part of the polluter is tantamount to a key defence in the tort of negligence as elaborated by Lord Atkin in the well-known case of *Donoghue v Stevenson*.⁴⁷ In this vein, Lord Atkin observed that: ‘...in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury’.⁴⁸

It is maintained by Ojukwu-Ogba that the defences as provided under section 4 of the Act are couched to favour violators since the defences provide a ‘leeway’ for the refining companies

43

Oil in Navigable Waters Act (n 40), s 6.

44

ibid, s 4(2) (a).

45

ibid.

46

Oil in Navigable Waters Act (n 40), s 4(2) (b).

47

[1932] AC 562 (HL).

48

ibid 579 (Lord Atkin).

to enjoy some measure of immunity from liability.⁴⁹ This has brought the work to the forefront of one major issue in this research; whether the requirement of ‘reasonableness’ and ‘reasonable care’ on the part of the defendant to establish liability will still create any impression that the defendant is strictly liable for his conduct which has caused damage to the environment. It is submitted that liability under the Oil in Navigable Waters Act is more connected to liability under nuisance and negligence than it could be under strict liability, this is because the carefulness of the defendant in strict liability tort is immaterial provided it is obvious that there is foreseeability of the likelihood of the activities carried out to cause injury to the public.

5.3.3 Oil Pipelines Act 2004⁵⁰

One major Nigerian statute that guides the issuance of licenses and the maintenance of oil pipelines is the Oil Pipelines Act 2004. The Act also recognises the individual rights of landowners⁵¹ and determines the liability of transnational corporations as it relates to the pollution of the environment via oil and gas. The holders of licences on the use of oil pipelines are required to take all ‘reasonable steps’ to avoid unnecessary damage which can be caused as a result of the use of any land entered upon, and such reasonable steps should extend to buildings, crops or economic trees on the land.⁵² Section 11(5) of the Oil Pipelines Act⁵³ creates a civil liability on oil companies or licensees who own pipelines to pay compensation to anyone who has suffered injury as a result of any leakage of oil from the oil pipelines,⁵⁴ section 11 of the Oil Pipelines Act deals generally with the ‘Rights and

⁴⁹

Ojukwu-Ogba (n 28) 205.

⁵⁰

Cap O7 LFN 2004.

⁵¹

Ojukwu-Ogba (n 28) 205.

⁵²

Ojukwu-Ogba (n 28) 205.

⁵³

Oil Pipelines Act (n 50), s 11(5).

⁵⁴

Environmental Resource Institute (n 29).

obligations of the holder of a license.’ While obtaining a licence under the Act permits the holder to lay oil pipelines⁵⁵ (pipelines for the conveyance of mineral oils, natural gas or any of their derivatives), the Act equally creates the grounds under which direct compensation must be made to any person who has suffered injury as a result of escape of oil and gas.⁵⁶ In order to decipher the extent of liability of polluters (licensee) under the Act, it will be necessary to look closely at each of the provisions and enumerate briefly on them.

Section 11(5)(a) of the Oil Pipelines Act provides that:

The holder of a licence shall pay compensation to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is injuriously affected by the exercise of the right conferred by the licence, for any such injurious affection not other-wise made good.⁵⁷

It is apparent from the foregoing provision that compensation shall be awarded to any person who has suffered injury as a result of escape of crude oil or gas from the pipelines owned by the polluter. Within the above section, it is stated that persons who have interest in any land ‘whether or not it is land in respect of which the license has been granted’, would be entitled to such compensation. In the case of *Read v J Lyons & Co Ltd*,⁵⁸ Viscount Simon defined escape as: ‘Escape... means escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control.’⁵⁹ In line with this definition of escape, and ‘escape’ being a primary requirement to establish ‘Strict liability’ in the case of *Rylands v Fletcher*,⁶⁰ it is clear that whoever has suffered injury from the escape

⁵⁵

Oil Pipelines Act (n 50), s 11(1) and (2).

⁵⁶

Oil Pipelines Act (n 50), s 11(5) (a) (b) and (c).

⁵⁷

Oil Pipelines Act (n 50), s 11(5) (a).

⁵⁸

[1947] AC 156 (HL).

⁵⁹

ibid 168 (Viscount Simon).

⁶⁰

Rylands (n 8).

of crude oil or gas on his land, irrespective of whether the land is under the control of the polluter or not can be compensated.

Furthermore, section 11(5)(b) of the Oil Pipelines Act in relation to compensation provides that:

The holder of a licence shall pay compensation to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good.⁶¹

Again, it is deducible from the above that the compensation which can be derived by the person who has suffered injury will be based on the ground that the polluter or any of its servants is *negligent* in the conduct which has caused damage or injury. It therefore entails that the proof of lack of ‘reasonable care’ is a prerequisite to obtain damages under the Act.

Finally, section 11(5)(c) of the Oil Pipelines Act provides that:

The holder of a licence shall pay to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any break-age of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.⁶²

On this last provision relating to the compensation for damage suffered by the persons who own a legal interest in the land, the qualifications are explicit. In essence, the polluter can raise a defence against the claim for compensation by the claimants that the Act which has occasioned harm to the claimants was caused by the claimants themselves or by the act of a third party. These defences are available to a defendant in cases of strict liability as enumerated in chapter 1 of this research, particularly in figures 1.5.3 (Act of a stranger) and 1.5.4 (Default of the claimant). Despite these defences which have been made available to the owners of oil pipelines with regards to liability of escape of oil and gas; can one still assert that the liability under the Oil Pipelines Act, is strict? It is more appropriate to maintain that liability under the Oil Pipelines Act is determined by principles of the common law tort of *negligence*. This position is informed on the grounds that liability under the Act arises in

⁶¹

Oil Pipelines Act (n 50), s 11(5) (b).

⁶²

Oil Pipelines Act (n 50), s 11(5) (c).

circumstances where it is shown that the polluter has neglected to protect, maintain or repair any works, thereby causing oil spillage and consequently injuries to others.⁶³ Literally, to ‘neglect’ is to fail to care properly. It follows that under the Oil Pipelines Act, there is a legal duty of care imposed on oil companies,⁶⁴ and the locus classicus on the tort of negligence is as shown in the English case of *Donoghue v Stevenson*.⁶⁵

5.3.4 Associated Gas Re-Injection Act 2004⁶⁶

The Associated Gas Re-Injection Act deals specifically with the unlawful gas flaring activities of oil companies in Nigeria.⁶⁷ Of utmost relevance on the prohibition of gas flaring by the Act is section 3 (1) of the Gas Re-Injection Act,⁶⁸ which provides that: ‘Subject to subsection (2) of this section, no company engaged in the production of oil or gas shall after 1 January, 1984 flare gas produced in association with oil without the permission in writing of the Minister.’

The above provision prohibiting gas flaring in Nigeria from the commencement of 1st January 1984 has a limitation which is that: oil and gas companies in Nigeria can only be permitted to flare gas under the permission of the Minister of Environment, as provided in section 3 (2) of the Act.⁶⁹ This excuse for gas flaring can only be possible in circumstances where the Minister is satisfied that the utilisation or re-injection of the gas by the oil company is not

⁶³

See section 11(5) (b) of the Oil Pipelines Act (n 50).

⁶⁴

See figure 1.4.3 and 1.4.4 on the common law tort of negligence and the meaning of due care respectively.

⁶⁵

[1932] AC 562 (HL).

⁶⁶

Cap 20 LFN 2004.

⁶⁷

Environmental Resource Institute (n 28).

⁶⁸

Associated Gas Re-Injection Act (n 66), s 3(1).

⁶⁹

ibid, s 3(2).

appropriate or feasible.⁷⁰ Section 4 of the Act makes provisions for penalties which are connected to the unlawful flaring of gas, which include withholding of all or part of any entitlements from the company, forfeiture of concession in the oil field and the repair or restoration of any reservoir in the field in accordance with good oil field practice.⁷¹

It is pertinent to point out that the only defence which is available to oil and gas TNCs in cases of gas flaring under the Associated Gas Re-injection Act is ‘statutory authority’. That is, gas flaring can only be allowed where proper permission has been obtained from the relevant Minister. The defence of statutory authority is one of the basic defences available to a defendant under the strict liability rule as established in *Rylands v Fletcher*.⁷² Under the defence of statutory authority as pointed out in chapter 1 of this research (figure 1.5.1), it was mentioned that there are two major conditions under which the defence of statutory authority can avail the defendant. The first condition is that the defendant must not be negligent and secondly, the damage caused must be the inevitable consequence of the requirement under the enabling statute.⁷³ These latter conditions are judicially informed by the earlier English case of *Charing Cross Electricity Co v London Hydraulic Power Co*.⁷⁴ The facts of Charing Cross’s case, earlier stated in figure 1.5.1 would be relevant and instructive in the current discussion. In that case, the claimants’ underground electric cables were damaged as a result of the escape of water maintained at high pressure from the defendants’ underground mains. Both the claimants and the defendants were companies carrying on undertakings for profit, for the purposes of which they had obtained statutory permission and powers under Acts of Parliament. The Court held the defendants liable on the grounds that the escape of water

⁷⁰

Associated Gas Re-Injection Act (n 66), s 3(2) (a) and (b).

⁷¹

ibid, s 4(1) and (2).

⁷²

See figure 1.5.1 in chapter 1 of this thesis on the defence of statutory authority.

⁷³

Dunne v North Western Gas Board [1964] 2 QB 806, 835.

⁷⁴

[1914] 3 KB 772 (CA).

causing nuisance to the claimant was as a technical error on the defendants' engines⁷⁵ and the 'statutory powers' only permit the provision of water for industrial purposes. In essence, there was no duty to maintain water under high pressure and therefore the 'escape' was not the inevitable consequence of the exercise of the statutory powers.

It follows, in the light of the above, that, it is not enough for the defendant to say he is authorised under statute to carry out the activity which has caused injury to the claimant, but it must be shown that due diligence is applied. In the English case of *Dunne v North Western Gas Board* the Court of Appeal maintained inter alia, that there would be no liability if what had been done (incident causing injury) was that which was expressly required by statute or was reasonably incidental to that requirement and was carried out without negligence.

It has been observed that the Associated Gas Re-Injection Act⁷⁶ did not make any provision for any other familiar requirements such as that of 'reasonable foreseeability' and the 'duty of care' in establishing the liability of the defendants as can be seen in other related torts of strict liability, nuisance and negligence and even in other related Nigerian statutes discussed in this chapter. It follows that the Act is silent on the position of liability of the oil and gas companies in circumstances where gas flaring is as a result of negligence, or accidental emission. It is submitted that where gas is flared negligently and in clear deviation from the ambit of the statutory mandate, liability will lie against the licence holder. It is pertinent to add that the statutory requirement to flare gas under the Associated Gas Re-Injection Act in such a manner that would affect fundamental rights of citizens (right to a safe environment) has been declared null and void by a Federal High Court in Nigeria in the case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria and others*.⁷⁷ This is given adequate consideration in the next chapter.

⁷⁵

Charing Cross Electricity Co (n 74) 782 (Lord Sumner).

⁷⁶

Associated Gas Re-Injection Act (n 66).

⁷⁷

[2005] AHRLR 151 (Federal High Court, Benin judicial division).

5.3.5 **Petroleum Act 2004**⁷⁸

The Petroleum Act is the primary legislation in Nigeria that deals on the activities of oil and gas companies.⁷⁹ The Act makes provisions for liability of environmental polluters and compensation of persons who are likely to suffer injury as a result of the negative impacts of oil and gas exploration and production. Section 37 of the Act provides as follows:

The holder of an oil exploration licence, oil prospecting licence or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for the disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.⁸⁰

Again, this provision seems to be straightforward without any qualification as regards the liability of a licensee who has caused injury to any person in lawful possession of land, and it appears to be the benchmark for the compensation of persons who have suffered damages generally in Nigeria. Section 9(1)(b) of the Act⁸¹ empowers the Minister to make regulations for the prevention of air and water pollution, and consequently, the Petroleum (Drilling and Production) Regulation⁸² was established as an offshoot of the powers of the Minister under the aforesaid provision of the Act. Of immense importance to the liability of oil licensees is Regulation 23 of the Petroleum (Drilling and Production) Regulation which provides that:

If the licensee or lessee exercises the rights conferred by his licence or lease in such a manner as unreasonably to interfere with the exercise of any fishing rights, he shall pay adequate compensation there for to any person injured by the exercise of those first- mentioned rights.⁸³

⁷⁸

Cap P10 LFN 2004.

⁷⁹

Environmental Resource Institute (n 29).

⁸⁰

Petroleum Act (n 78), s 37.

⁸¹

Petroleum Act (n 78), s 9 (1) (b).

⁸²

Petroleum (Drilling and Production) Regulation 1969.

⁸³

The qualification from the above provision ‘unreasonably to interfere,’ seems to place another substantial evidential burden on the claimant in order to establish liability.⁸⁴ In essence, the claimant will have to establish that the defendant has unreasonably interfered with his fishing rights, hence, the birth of the ‘reasonability test’ as required in establishing the tort of negligence and other common law torts of nuisance, as well as strict liability as discussed in the early part of this research.⁸⁵

5.4 Responsibility and Compensation in Oil and Gas Pollution Incidents in Nigeria

In considering the Nigerian legislation as regards responsibility and compensation, the provisions of the Oil Pipelines Act would serve as a benchmark to be considered. Of more relevance is section 11(5)(b) of the Oil Pipelines Act which provides that:

The holder of a license shall pay compensation to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence, for any such damage not otherwise made good.⁸⁶

A recent ruling by a London High Court based on a claim brought before it by residents of Bodo community (Gokana local government area) in the Niger Delta region of Nigeria alleging a massive devastation of fishing grounds and other basic means of their livelihood as a result of oil spills estimated to over 250,000 barrels, predicated the compensation regime to the Oil Pipelines Act.⁸⁷ One of the key issues for determination was whether SPDC can be liable under section 11(5)(b) of the Oil Pipelines Act to pay just compensation for damage for damage caused by oil from its pipelines that has been released as the result of illegal bunkering and/ or illegal refining? The judge (Mr Akendhead, President of the Technological

Petroleum (Drilling and Production) Regulation 1969 (n 82).

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KSA Ebeku, ‘Compensation for damage arising from oil operations: Shell Petroleum Development Company of Nigeria v Ambah revisited’ (2002) 7 IELTR 155, 156.

⁸⁵

See Chapter 1 of this research on ‘Reflecting on the doctrines of strict and absolute liabilities’.

⁸⁶

Oil Pipelines Act (n 50), s 11(5) (b).

⁸⁷

The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC). The judgment adequately took cognisance of landmark judicial cases on environmental liability, both in Nigeria and the English jurisdictions.

and Construction Court) found that the Nigerian Oil Pipelines Act does not hold oil operators liable for oil spills caused through illegal engagement in bunkering and other criminal activities due to the fact that such illegal activities have not been executed under licence by the licensee (or oil operators),⁸⁸ but that liability can arise against oil operators where it is shown that a preventable damage is done to the oil pipelines due to neglect or failure to protect on the part of the licensee, albeit the court admitted that this may be difficult to establish but ‘but there is that theoretical possibility’.⁸⁹ On this latter standpoint, commentators have observed that liability would lie against oil operators highlighted if they failed to install surveillance or anti-tampering equipment, or if it knew the time and location of a planned attack by suspected vandals and decided not to inform the police.⁹⁰ The legal representatives of the claimants (Bodo community) were more inclined, based on the aforesaid ruling of the court to reason that Shell could now be liable to compensate for illegal oil theft from its pipelines if it fails to take reasonable steps to protect its infrastructure. In this vein, Martyn Day, a representative of Leigh Day (Claimants representative) said:

This is a highly significant judgment. For years, Shell has argued that they are only legally liable for oil spills that are caused by operational failure of their pipelines and that they have no liability for the devastation caused by bunkered [stolen] oil. This judgment entirely undermines that defence and states in clear terms that Shell does have potential liability if it fails to take reasonable steps to protect its pipelines.⁹¹

The claimants argued that under the pipelines Act, anyone who suffered damage can claim compensation if they can show Shell was guilty of neglect in failing to ‘protect, maintain or repair’ the pipeline, and that Shell should retain this duty of care on issues relating to illegal

⁸⁸

The Bodo case (n 87) [93].

⁸⁹

ibid [93].

⁹⁰

John Vidal, ‘Shell faces payouts in Nigeria oil spill case’, *The guardian* (London, 20 June 2014) <<https://www.theguardian.com/environment/2014/jun/20/shell-faces-payouts-nigerian-oil-spill-case>> accessed August 2014.

⁹¹

ibid.

acts against the pipeline.⁹² Whilst commenting on the Court's ruling on the *Bodo* incidence, Gaughram, Amnesty International's director of global issues, observed that:

The court's message is clear-if you don't take adequate measures to protect your pipelines from tampering, you could be liable for the damages caused. The ruling has opened the door for Nigerian claimants to demand compensation if oil leaks were a result of sabotage or theft- if the sabotage or theft was due to 'neglect on the part of the [licence] holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing'.⁹³

Mr Akenhead's ruling on the Bodo community case seems to gather more social and legal interest. Socially, the Niger Delta is seen to be one of the most polluted regions in the world and the Bodo's case in particular is reported to represent the largest loss of mangrove habitat ever caused by an oil spill.⁹⁴ On its legal significance, it is the first time Shell is brought before an English court to determine key legal issues on environmental pollution in Nigeria. In essence, the Bodo case retains a historic socio-legal background which deserves attention of legal experts. This is more significant to the current research because it creates a legal atmosphere and a medium to test the compatibility of the Nigerian law and the English law on environmental liability issues as well as examining the human rights perspective of such liability principles in order to sustain a more intellectual argument and test the current hypotheses of this research, particularly 'whether the current technique of measuring liability, particularly under tort law is clear in Nigerian law'.

It is shown in the *Bodo* case that the 'reasonable steps' to be taken by oil operators in protection of pipelines, can, in some cases, be interpreted as including curtailing intentional acts of sabotage.⁹⁵ To this extent, oil operators would be deemed, in some exceptional cases

⁹²

Leigh Day, 'Hearing to determine key legal issues in claim against shell by 15,000 Nigerians' (London, 28 April 2014) <<http://www.leighday.co.uk/News/2014/April-2014/Shell's-first-time-in-UK-Court-over-key-issues-in>> accessed 12 January 2015. Information relating to the proposed points of argument from the legal representatives of the Claimants is found on their website under 'News and events'.

⁹³

Vidal, 'Shell faces payouts in Nigeria oil spill case' (n 90).

⁹⁴

ibid.

⁹⁵

The Bodo case (n 87) [93].

not to have taken ‘reasonable steps’ if they fail to comply with modern technologies that could safeguard the pipelines and other installations.⁹⁶ For instance, installation of anti-tampering equipment or other sort of technology to maintain rapid surveillance would amount to reasonable or preventable steps to avoid oil spills. But this could not be interpreted to include security from government agencies. In this regard Mr Akenhead maintained further that:

...I am confident that the word “protect” cannot have been intended to mean that protection was to involve policing or military or paramilitary defence of the pipelines. If one takes those activities out of the verbal equation, the usual definitions can be seen to be closer to shielding from danger, injury or change and keeping safe and taking care of.⁹⁷

These challenges witnessed by victims in obtaining legal redress in cases of environmental pollution have instigated most communities hit by oil spills to bypass the Nigerian courts and seek for redress in other jurisdictions. In this vein, a Bonny Island Community leader in Rivers State of Nigeria, Amasenibo Abere, in response to a recent oil spill in Bonny, amounting to around 3,800 barrels was quoted to say:

It makes sense to work with a UK law firm. Normal life has stopped here because of the spill. This was just the last of multiple spills we have experienced. Shell has still not done the clean-up here. They are a big company and if we go to the Nigerian courts, they will win.⁹⁸

Abere’s stance is likely to be common amongst local victims of oil pollution in the Niger Delta area. However, this research is basically concerned with the likely issues and challenges confronting the dispensation of justice in oil and gas pollution cases, particularly in a human rights perspective.

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The Bodo case (n 87) [92] (g).

97

The Bodo case (n 87) [92] (b).

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John Vidal, ‘Niger delta communities to sue shell in London for oil spill compensation’ *The guardian* (London, 7 January 2015) <<https://www.theguardian.com/environment/2015/jan/07/niger-delta-communities-to-sue-shell-in-london-for-oil-spill-compensation>> accessed 15 October 2015

The Nigerian courts in both cases of *Anthony Atubin & ors v Shell Petroleum Development Company Nigeria Ltd*,⁹⁹ and *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*¹⁰⁰ have made it explicit that compensation cannot be made to victims where the damage to the oil pipelines was caused by a third party.¹⁰¹ In the light of the provision of section 11(5) (b) of the Oil Pipelines Act necessitating the payment of compensation by oil companies to any person suffering damage by reason of any neglect to protect, maintain or repair any work, structure or thing under its control, there seems to be a complex legal burden on the part of oil TNCs in raising any sustainable defence to escape liability in cases of oil spill caused by their equipment. This is because where a claimant alleges the incidents of pollution caused as a result of neglect by TNCs of their equipment, even if such pollution is caused by vandals, there would likely be the need to furnish additional evidence by oil TNCs to evidently show that such rupture or damage was caused by a third person and not as a result of neglect, and supposing it is established that the spill was a result of the act of a third person, it is still incumbent on the court to verify whether such interference by a third party was as a result of neglect on the part of the operator of its facilities.¹⁰²

It is obvious that court decisions are mostly based on the prevailing circumstances at the jurisdiction in question. The requirement by the Petroleum (Drilling and Production) Regulation, 1969 to impose liability for compensation in favour of an injured person where fishing rights are ‘unreasonably interfered’ with,¹⁰³ places an opportunity for courts to interpret what is ‘reasonable’ in a unique and compatible manner.

99

Unreported Suit no UCH/43/73 of 21/11/1974 (High Court of Ughelli Nigeria).

100

[1973] MWSJ 61 (Per Ovie Whiskey J).

101

See Figure 1.7 in chapter one of this research for a better appreciation of the Nigerian courts on liability of polluters and the associated defences.

102

The Bodo case (n 87) [92] (f).

103

See Regulation 23 of the Petroleum (Drilling and Production) Regulation 1969.

In the light of the foregoing, it is submitted that provisions of the Oil Pipelines Act 2004 (OPA) on liability must be given closer attention in determining the liability of oil operators in oil spill claims in view of the position of the English Court in the *Bodo case* to the effect that ‘there is a sufficiently comprehensive code within the OPA to cover the key aspects of the whole process involved in the pipelines,’¹⁰⁴ and that the statutory scheme of the OPA retains a wider scope than the common law principles in nuisance, negligence and the rule in *Ryland v Fletcher*.¹⁰⁵ It is on this basis that the English High Court in the *Bodo case* resolved that the claimants were entitled to compensation in respect to the damages resulting from the series of spills under the OPA at the exclusion of common law rules.¹⁰⁶ Conversely, it is pertinent to add that the entire provisions of the OPA 2004 as considered are clear reflections of common law rules, and in this vein, it is difficult to agree with Akenhead’s position that environmental liability under the OPA can be determined at the exclusion of common law rules.

5.5 Compensation Regime and Issues of Environmental Liability in International Law.

International law basically oversees the relationship between states. To this extent, international environmental law focuses on environmental issues that are obtainable in a global perspective. It is a deliberate attempt to seek for a uniform body of rules and regulations that would gain consensus from across as large a number of countries as possible in addressing environmental problems.¹⁰⁷ Bell and others maintained that international environmental law has no direct effect on domestic law and individuals, but it seeks to lay down a broader framework, and indirectly affects states by publicizing certain significant issues, by laying down best global practices, or imposing political pressure on States to change their domestic laws or practices. This is compared with European Union law which has a more direct effect on member states and individuals.¹⁰⁸ Notwithstanding, the principles of the United Nations Conference on Human Environment (Stockholm Declaration) 1972 and

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Bodo Case (n 87) [64] (a) (Mr Akenhead).

¹⁰⁵

Bodo Case (n 87) [64] (d).

¹⁰⁶

ibid [21]. See also issue 1 of the *Bodo case* and its resolution in [69].

¹⁰⁷

Stuart Bell and others, *Environmental Law* (8th edn, OUP 2013) 86.

the Rio Declaration on the Environment and Development 1992, have had significant impact on Nigerian law and policies as regards the need to maintain a pollution free environment as well as compensating victims of environmental hazards. Likewise in the UK, laws and government policies are, in some cases, influenced by various international instruments. For example, the Pollution Prevention and Control Act 1999,¹⁰⁹ empowers the Secretary of State to make Regulations for the purpose of implementing any obligations of the UK under the EU or under any international agreement to which the UK is a party. Bell and others were more precise on the nature of the obligations contained in international instruments, stating that 'such law is not generally binding, in the sense that EU law is, because of the lack of sanctions available for non-compliance.'¹¹⁰ The latter reasoning by Bell and others may not be sustained by many, considering Article 36 of the Statute of the International Court of Justice, which provides *inter alia*, that state parties to the Statute may at any time declare that they recognise as compulsory, the jurisdiction of the Court in all legal disputes concerning the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of an international obligation.¹¹¹ Owing to the foregoing, it is pertinent to add that where there is breach of an international obligation, there are relevant international sanctions attached to such breach.

Having considered briefly the nature of international law and its nexus to domestic law, it is necessary to examine the measure of liability in the principle of the protection of the environment as retained in international treaties and conventions. It is noteworthy that the Stockholm and Rio Declarations are outputs of the first and second global environmental conferences, respectively.¹¹² The Stockholm Declaration is the first global attempt to create

¹⁰⁸

ibid.

¹⁰⁹

Pollution Prevention and Control Act 1999, s.2 and Schedule 1 paras 3.

¹¹⁰

Bell and others (n 107) 87.

¹¹¹

Statute of the International Court of Justice 1945, article 36 (2) (c) and (d).

¹¹²

impact on the human environment by forging a focal common outlook on how to address the challenge of enhancing and preserving the environment.¹¹³ A close consideration of the 27 principles of the Stockholm Declaration reveals that the instrument supports wide environmental policy goals and objectives rather than detailed normative positions.¹¹⁴ Gunther, whilst emphasising on the ground-breaking significance and relevance of the Stockholm Declaration to environmental protection maintained that:

...Following Stockholm, global awareness of environmental issues increased dramatically, as did international environmental law-making proper. At the same time, the focus of international environmental activism progressively expanded beyond transboundary and cross-sectoral regulation and the synthesizing of economic and development considerations in environmental decision-making.¹¹⁵

This document has been widely commended as an eye-opener as regards environmental rights at national as well as international levels. In this vein, it provides that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.¹¹⁶

This research is keen to ascertain the concept of state responsibility in environmental pollution issues on international environmental law, hence, the need to turn to this document and other related international instruments on their contributions to the subject matter. The Stockholm Declaration places on nations a responsibility to ensure that activities within their jurisdictions and control do not cause damage to others. This is specifically provided for under principle 21 of the document. It provides that:

Gunther Handl, 'Declarations of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on the Environment and Development, 1992' (2012) 1 <<http://legal.un.org/avl/ha/dunche/dunche.html>> accessed 12 January 2015.

113

ibid.

114

ibid.

115

Gunther Handl (n 112).

116

See principle 1 of Stockholm Declaration (n 2).

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.¹¹⁷

The above provision of the Stockholm declaration guarantees state's sovereign rights to exploit their resources provided such activities do not cause damage to other states. This provision, with an independent interpretation seems to be vague without any legal consequences against states that would likely breach the aforesaid obligation. Against this background, Sanford has submitted that responsibility implies a corresponding legal obligation to provide reparation or compensation in events where the responsibility is not complied with.¹¹⁸ In order to avoid a lacuna or considering principle 21 a hollow concept, the delegates of the Stockholm Declaration adopted principle 22, which provides that:

States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such states to areas beyond their jurisdictions.¹¹⁹

Again, considering difficulties in enforcing international obligations, the practicability of this responsibility of states in both principles 21 and 22 of the Stockholm can be questioned. Notwithstanding, Article 235 of the Law of the Sea Convention (hereinafter UNCLOS) provides that:

States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.¹²⁰

In the same vein, a very significant international document, the Rio declaration, provides that:

¹¹⁷

Stockholm Declaration (n 2) principle 21.

¹¹⁸

Sanford E Gaines, 'International Principles for Transnational Environmental Liability: Can Development in Municipal Law Help Break the Impasse?' (1989) 30 Harv Int'l LJ 311.

¹¹⁹

Principle 22 of Stockholm Declaration (n 2).

¹²⁰

United Nations Convention on the Law of the Sea (adopted 10 December 1982), art 235 para1.

States have, in accordance with the Charter of the United Nations and the Principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹²¹

It seems that the list of international instruments projecting the basic principle of *state responsibility* is inexhaustible. This is an affirmation to the fact that the principle of state responsibility is a core part of international law. Article 1 of the International Law Commissions' Articles on state Responsibility proclaims that 'Every internationally wrongful act of a State entails the international responsibility of that state.'¹²² This Article is very explicit to the effect that a breach of international law by a state entails its international responsibility,¹²³ and the grounds under which this responsibility can be invoked is further provided in Article 2, that: 'There is an internationally wrongful act of a State when conduct consisting of an act or omission is attributable to the state under international law; and constitutes a breach of an international obligation of the state.'¹²⁴ The two identifiable elements under which the international wrongful act of a State can be established are that the conduct in question must be linked to the state under international law, and the conduct must constitute a breach of an international legal obligation which the state is a party at the time of the breach.¹²⁵

¹²¹

United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) A/CONF. 151/26 Vol.1, Principle 2.

¹²²

The International Law Commission's Articles on State Responsibility. Draft Articles on Responsibility of States for Internationally Wrongful Acts (Part One), November 2001, Supplement No. 10 (A/56/10), chp IV E.1. The Commission was established by the United Nations General Assembly in 1948.

¹²³

James Crawford, *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries* (3rd edn, Cambridge University Press 2005) 77.

¹²⁴

The International Law Commission's Articles on State Responsibility (n 122) Article 2 (a) and (b).

¹²⁵

Crawford (n 123) 81.

The above mentioned Conventions are products of the General Assembly of the United Nations. In this regard, it is pertinent to consider an overview on the application of these provisions by the International Court of Justice ('the Court or the ICJ'), the principal judicial organ of the United Nations.¹²⁶ In line with the provisions of the Statute of the International Court of Justice 1945, the Court is vested with the powers to decide in accordance with international law such disputes as are submitted to it; taking into cognisance international conventions, international custom, general principles of law recognised by civilised nations and the teachings of the most highly qualified publicists of various nations.¹²⁷ But the Court is not to be prejudiced or limited by the aforementioned guidelines, as the court can decide a case '*ex aequo et bono*' (according to equity and good conscience) provided the parties to the dispute agree to it.¹²⁸

There exists a plethora of judicial cases before the ICJ showcasing the doctrine of state responsibility as a traditional concept in international law. In the case concerning *Phosphates in Morocco, between the government of Italy and the government of the French Republic*,¹²⁹ the ICJ was of the view that the violation of international law is an act which, would, by itself directly attract international responsibility, and that once an act has been attributable to a State which is contrary to the treaty right of another State, international responsibility would be established between the two States.¹³⁰

It could be seen that the principle of state responsibility is an integral part of the body of international law and it precedes the Stockholm Declaration. In the case of the *United Kingdom of Great Britain and Northern Ireland v The Government of the People's Republic*

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By virtue of Article 1 of the Statute of the International Court of Justice, the International Court of Justice is recognised as the Principal Judicial organ of the United Nations.

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See article 38 (1) (a) (b) (c) and (d) of the Statute of the International Court of Justice.

¹²⁸

ibid, art 38, para 2.

¹²⁹

Phosphates in Morocco (Italy v France) (Preliminary Objections) [1938] PCIJ Series A/B No 74, 28.

¹³⁰

ibid.

of Albania,¹³¹ (the Corfu Channel Case) the UK government claimed that the Albanian government either caused to be laid or had knowledge of the laying of mines in its territorial waters in the Strait of Corfu without giving any prior notice of the existence of the mines as required by the provisions of Articles 3 and 4 of the Hague Convention 1907,¹³² by the principles of international law and by the ordinary dictates of humanity.¹³³ The UK government further claimed that two destroyers of the Royal Navy were damaged by the mines, and this led to the death of forty-four personnel of the Royal Navy and serious injury to the destroyer, and that the loss and damage suffered was due to the failure of the Albanian Government to comply with its international obligations. On these grounds, the UK government prayed that the International Court of Justice should declare the Albanian government internationally responsible for the said loss and injury, and therefore, make reparation or pay compensation therein.¹³⁴

The International Court of Justice (ICJ) gave its judgment partly in favour of Albania and partly in favour of the United Kingdom. Whilst the ICJ observed that ‘by reason of the acts of the British Navy in Albania waters in the course of operation in 1946, the UK violated the sovereignty of the People’s Republic of Albania,’¹³⁵ the ICJ declared the People’s Republic of Albania responsible under international law for the explosions of the mines, and the consequent damage and loss of human lives.¹³⁶ This judgment confirmed the principle that States retain an obligation to ensure that activities within their jurisdiction or control do not

¹³¹

Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4, 10.

¹³²

Under Articles 3 and 4 of the 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, any Government laying mines in war-time, and a fortiori in peace is bound to notify the danger zones to the government of all countries.

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Corfu Channel Case (n 131).

¹³⁴

ibid.

¹³⁵

Corfu Channel Case Judgment (n 131) 36.

¹³⁶

Corfu Channel Case Judgment (n 131) 36.

cause harm to others. Following the *Corfu Channel* case, it is clear that such responsibility would cease to exist where the injured State is fully aware of the nature of the cause of harm.¹³⁷ Equally, the State where the harm originates should have a reasonable foresight of the likelihood of their activities to cause harm in order to be liable. This latter position could be challenged on the basis that the Stockholm Declaration is silent on whether the lack of reasonable foresight of harm would act as a defence. Rather, the international principle of State responsibility tends to establish liability on the originating states provided their activities have caused damage to others. A close analysis of the position of the International Court of Justice would provide a clue on the measure or standard of liability applicable in transboundary pollution cases.

The foundation for Albania's liability as alleged by the UK government is that the minefield which caused the explosion was laid by or with the connivance or knowledge of the Albanian government.¹³⁸ From the aforesaid, it could be seen that there are three basic elements to be proved. The first submission that the mine was laid by the Albanian government itself was discarded by the Court when it said:

Although the suggestion that the minefield was laid by Albania was repeated in the United Kingdom statement in Court on January 18th, 1949, and in the final submissions read in Court on the same day, this suggestion was in fact hardly put forward at that time except *pro memoria*, and no evidence in support was furnished. In these circumstances, the Court need pay no further attention to this matter.¹³⁹

In the light of the above, it is deducible that claimants, in order to establish liability, must show satisfactory evidence linking the state to the alleged activity that has caused harm. This, to an extent would require more of direct evidence. The Court was explicit to the fact that knowledge of the minelaying cannot be imputed to the Albanian government merely on the

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For instance, the joint provision of Article 3 and 4 of the 8th Hague Convention of 1907 as earlier mentioned (n 123) obliges states laying mines in war-time, and a fortiori in peace to inform the danger zones to the governments of all countries.

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Corfu Channel Case Judgment (n 131) 15.

¹³⁹

Corfu Channel Case Judgment (n 131) 16.

grounds that the minefield which caused harm to the British warships was discovered in the Albanian territory.¹⁴⁰

In considering the second alternative argument, which the UK government alleged that the Albanian government connived with the Yugoslav government through two warships to lay the mines,¹⁴¹ the Albanian government denied that the mines were laid by its connivance or help of a third party. Again, in the opinion of the Court, the allegation fell short of conclusive evidence that there is a case of connivance or help from a third party.¹⁴² But the Court expressed its misgivings on the flagrant denials of the Albanian government regarding the series of allegations when it said:

It is true, as international practice shows, that a state on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that state cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and its authors.¹⁴³

Finally, the submission by the UK government that whoever the authors of the minelaying were, it could not have been done without the Albanian government's knowledge was put for consideration. In determining this issue, the Court stressed on the challenges faced by a victim state in establishing that the direct cause of the harm is from the defendant, having regard to the fact that the territory is exclusively in control of the defendant. Against this background, the Court maintained that:

By reason of this exclusive control, the other state, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a state should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognised by international decisions. It must be regarded as of special weight when it is

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Corfu Channel Case Judgment (n 131) 18.

¹⁴¹

Corfu Channel Case Judgment (n 131) 16.

¹⁴²

ibid 17.

¹⁴³

Corfu Channel Case Judgment (n 131) 18.

based on a series of facts linked together and leading logically to a single conclusion.¹⁴⁴

It is inferred from the above that claimants in cases of transboundary pollution should be given a more liberal recourse in the course of establishing the liability of the defendant (pollution originating state), this is due to the fact that the place where the said explosion or damage occurs is exclusively in possession of the defendant and there would be challenges in obtaining any direct evidence in establishing liability. In what could be considered as the standard of proof in establishing liability, it is maintained that:

The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of mine-laying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.¹⁴⁵

It could be deciphered from the above that in establishing the ‘intention’ of the defendant in the activity that has caused harm to the claimant state, the Court will rely on an indirect evidence, drawing inferences from the available facts, and this must be done beyond reasonable doubt. It is true that in both civil and criminal matters, the person who mobilises the legal machinery retains the obligation to demonstrate the correctness of any assertion.¹⁴⁶ In essence, it is proper to say that the claimant (victim state) bears the burden of proof, but this burden could shift depending on the party who has the task to establish a fact. What is more relevant and significant in determining the liability of the defendant, is the nature of ‘proof’ needed. Uglow defined proof in trials as ‘the designation of a certain level of probability that a specific fact or state of affairs exists’.¹⁴⁷ Furthermore, the word ‘probability’ is briefly defined to mean a degree of likelihood or a degree of persuasion.¹⁴⁸ Concisely, and

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Corfu Channel Case Judgment (n 131).

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Corfu Channel Case Judgment (n 131) 18.

¹⁴⁶

Steve Uglow, *Evidence Text & Materials* (Sweet and Maxwell 1997) 60.

¹⁴⁷

ibid.

¹⁴⁸

in different words, standard of proof could be defined as the level of persuasion or the degree of likelihood that a certain fact or assertions exists.

In the light of the above, and in line with the requirement of the International Court of Justice in the Corfu Channel case, the claimant must persuade the Court or establish the likelihood that the defendant had knowledge of the cause of harm by drawing inferences from the circumstances surrounding the case, provided they ‘leave no room for reasonable doubt’. In drawing inferences from the facts of the case to establish ‘knowledge’ of the cause of harm to the claimant (UK government), and despite the denial of knowledge of the cause of the incidence by the Albanian government, the Court submits that:

The Albanian government’s notes are all evidence of its intention to keep a jealous watch on its territorial waters...it must be concluded that the operation was carried out during the period of close watch by the Albanian authorities in this sector. This conclusion renders the Albanian government’s assertion of ignorance a priori somewhat improbable.¹⁴⁹

With regards to the consideration of the Court, it is clear that the minelaying was done at a time when the Albanian government was maintaining a close surveillance over the Corfu Channel and nothing was done by the Albanian government to prevent the said disaster, and this omission is the reason for Albanian’s responsibility under international law. It is pertinent to add that by virtue of Article 17 of the United Nations Convention on the Law of the Sea, ‘ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea’.¹⁵⁰

The facts and the position of the ICJ in Corfu Channel case could be compared with that of *Argentina v Uruguay*¹⁵¹ (the Pulp Mills dispute’). The facts of the case have it that in 2006, the Argentine Republic filed in the Registry of the International Court of Justice (hereinafter the ‘ICJ’) an application instituting proceedings against the Eastern Republic of Uruguay in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations

Uglow, *Evidence Text & Materials* (n 146) 61.

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Corfu Channel Case Judgment (n 131) 19.

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UNCLOS (n 17).

¹⁵¹

Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep14.

under the Statute of the River Uruguay (a treaty signed by Argentina and Uruguay, in 1975).¹⁵² Argentina stated that the breach arose out of the authorization, construction and future commissioning of two pulp mills on the River Uruguay, which had resultant effects on the quality of the waters of the River Uruguay and the areas affected by the River.¹⁵³ Consequently, Argentina sought the Court to adjudge and declare amongst others that Uruguay has engaged its international responsibility to Argentina, therefore, Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it,¹⁵⁴ and resume strict compliance with its obligations under the Statute of the River Uruguay of 1975.¹⁵⁵

The ICJ concludes that Uruguay, by failing to inform CARU of the planned works as required under the treaty before issuing the authorizations for each of the mills failed to comply with the obligation imposed on it by Article 7 of the 1975 Statute.¹⁵⁶ Whilst affirming the principle of state responsibility, it was observed in the case that:

The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a state in its territory. It is “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states” (Corfu Channel, United Kingdom v Albania), merits, Judgment, ICJ Reports 1949, p.22). A state is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction causing significant damage to the environment of another State. This Court has established that this obligation “is now part of the corpus of international law relating to the environment” (Legality

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The treaty, amongst others, requires under Article 7, second and third paragraphs, that parties must inform CARU (Administrative Commission of the River Uruguay) for authorization of any planned works and such information would be communicated to neighbouring states under the treaty.

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Pulp Mills (n 151) para 1.

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Pulp Mills (n 151) para 22.

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ibid para 23.

¹⁵⁶

ibid para 111.

of the Threat or use of Nuclear Weapons, Advisory opinion, ICJ Reports 1996(1), p.242, para. 29).¹⁵⁷

As shown above, the Court strictly affirmed its position on state responsibility and was guided by its earlier judgment in the Corfu Channel Case, that states must avoid activities in their territories that would cause harm to others. However, the mention of ‘due diligence’ as a requirement of states in their territory deserves consideration. It is submitted that the concepts of ‘due diligence’, ‘due care’ and ‘reasonable care’ are used interchangeably as a primary requirement in establishing the tort of negligence as discussed earlier in this research.¹⁵⁸ For the sake of emphasis it would be pertinent to re-consider the legal meaning of negligence as expatiated by Lord Atkin in the case of *Donoghue v Stevenson*,¹⁵⁹ where he stated, that:

...You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question....¹⁶⁰

In the light of the above, it is maintained that the measure of liability obtainable in the principle of state responsibility appears not to reflect an absolute liability¹⁶¹ of the defendant in cases of harm to neighbouring state(s), rather, the defendant would be liable where it is shown through indirect evidence that a legal duty of care is owed to the claimant,¹⁶² that there is a breach of that duty, and that the claimant has suffered damages as an inevitable

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ibid para 101.

¹⁵⁸

See chapter 1, figures 1.4.2 and 1.4.3 of this thesis on elaboration on the tort of negligence.

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[1932] AC 562 (HL).

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Donoghue (n 159) 580.

¹⁶¹

See more elaboration on the concept of absolute liability in figure 1.10.

¹⁶²

The duty of care is shown by virtue of the provisions of international treaties requiring states not to cause harm to the environment of neighbouring states.

consequence of the breach. In essence, it could be argued that liability under international law is based on the ‘neighbour principle’ in the tort of negligence. Furthermore, it is maintained that in determining the responsibility of a state in cases of environmental pollution under international law the measure of liability could involve certain features of principles of criminal liability (for example proof beyond reasonable doubt, as shown in the Corfu Channel Case) and tortious liability (proof of reasonable foreseeability and due diligence).

It is observed that the Pulp Mills judgment anchoring liability for international harm on principles of negligence (prevention and due diligence)¹⁶³ was reached in error. This is because the construction of the Mills and its attendant harm was a foreseeable act, which should attract a strict and/or absolute liability. It is submitted that where damage is foreseeable and there is no third party intervention, liability should be absolute, irrespective of the claim for deployment of ‘due diligence’.

The desire to adopt uniform international rules and procedures for determining issues of liability and compensation in oil and gas pollution incidents has been extensive. Another significant and remarkable international legal document is the International Convention on Civil Liability for Oil Pollution Damage 1969 (hereinafter ‘the 1969 Convention’).¹⁶⁴ Of more relevance to the measure of liability involved in events of pollution in the sea is Article III (1) of the Convention. It provides that:

Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident.¹⁶⁵

In looking at the exceptions, paragraph 2 of the Article provides that:

No liability for pollution damage shall attach to the owner if he proves that the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and

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Pulp Mills (n 151) para 101.

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International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969).

¹⁶⁵

International Convention on Civil Liability for Oil Pollution Damage (n 164).

irresistible character or was wholly caused by an act or omission done with intent to cause damage by a third party, or was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.¹⁶⁶

A further exception under paragraph 3 provides that:

If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.¹⁶⁷

A close examination of the above provisions of the Convention depicts the strict liability of the owner of the ship; this is due to the absence of any need to prove fault. The ‘no-fault’ liability is synonymous with the doctrine of strict liability as captured in *Rylands v Fletcher*. In the same vein, liability under this Convention is far from the requirement of ‘due care’ in the tort of negligence, in the sense that the owner of a ship will not escape liability even if it is shown that he took all reasonable steps to avoid any likely leakage of oil.

Liability under the International Convention on Civil Liability for Oil Pollution Damage, 1969 in Article III has shown that a ship owner is strictly liable for the damage caused to a sufferer of the oil spill. Similarly, the exceptions under which a defendant can absolve liability in the strict liability doctrine are in line with those listed in the Convention. These exceptions are; Act of God,¹⁶⁸ act of third party¹⁶⁹ and default of the claimant.¹⁷⁰ The more traditional defence of ‘Statutory Authority’ in strict liability is absent under the Convention.

¹⁶⁶

International Convention on Civil Liability for Oil Pollution Damage (n 164), art III, para 2(a) (b) and (c).

¹⁶⁷

ibid, art III, para 3.

¹⁶⁸

The defence of Act of God is briefly explained in figure 1.5.5.

¹⁶⁹

See figure 1.5.3 on the defence of Act of a Third Party.

¹⁷⁰

See art III (3) of the 1969 Convention (n 164). See also figure 1.5.4 on the defence of ‘Default of the Claimant.

It is understandable that there could be no excuse to any such pollution incidence from a ship, on the grounds that the activities of the ship owner were authorised by any sovereign body. The defence of statutory authority could only be applicable in domestic law.

The 1969 Convention was widely accepted at the international level as a significant document for civil liability of ship-owners found culpable for oil discharge at sea, but the Convention was later revised and amended,¹⁷¹ leading to the adoption of the International Convention on Civil Liability for Oil Pollution damage, 1992 (hereinafter ‘the 1992 Convention’).¹⁷² The 1992 Convention is a consolidated version of the 1969 Convention,¹⁷³ and by virtue of Article II of the 1992 Convention, both legal instruments are to be read and interpreted together as a single document. It is interesting to note that the amendment of the 1969 Convention was with a view to increase the amount of compensation accruable to victims of oil spills at sea. This implies that the earlier principles on liability were retained in the 1992 Protocol. It is observed that many of the contracting parties to the 1969 Convention have since adopted the 1992 Convention and denounced the earlier one (the 1969 Convention), as at the time of publishing the report on liability and compensation for Ship-Source Oil Pollution by the United Nations Conference on Trade and Development in 2012, not all contracting States have done so, and as a result, both Conventions co-exist at the international level.¹⁷⁴

The issue of joint or contributory liability is applicable to environmental pollution incidents involving spills by oil ships. This same concept has been discussed in an earlier chapter on strict liability, to the effect that liability can be contributory between State governments and

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United Nations Conference on Trade and Development, *Liability and Compensation for Ship-Source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers* (2012) (Studies in Transport Law and Policy) No. 1 UNCTAD/DTL/TLB/2011/4 para 26.

¹⁷²

Protocol to the International Convention on Civil Liability for Oil Pollution damage (adopted 27 November 1992).

¹⁷³

Liability and Compensation for Ship-Source Oil Pollution (n 171).

¹⁷⁴

Liability and Compensation for Ship-Source Oil Pollution (n 171), para 30.

oil operators where damage is caused to a third party as a result of the oil and gas activities.¹⁷⁵ But under the 1992 Convention, where it is shown that an oil discharge incident, causing consequential damage has occurred, the owners of all the ships concerned will be jointly and severally liable for all damage that cannot be reasonably separated.¹⁷⁶

5.6 A Critical Overview of the Measure of Liability Applicable to International Environmental Law

From the above survey of the various international legal instruments on oil pollution liability, there seems to be a bit of inconsistencies and vagueness on the measure of liability in cases of damage or loss to victims of pollution in international law, the Conventions are more of normative in content. Having considered the Stockholm Declaration, Rio Declaration, the Law of the Sea Convention and the International Law Commissions Articles on State Responsibility, it is obvious that these treaties are basically complementary and suggestive for the need for Sovereign States to ensure that activities within their jurisdictions do not cause harm to the environment of others. Notwithstanding, it is maintained that not all of the aforementioned Conventions adequately grapple with issues bordering on the standard or measure of liability involved in events of transnational environmental pollution, thereby, creating a wide room for the International Court of Justice to utilise various aspects of international law to decide cases before it.

It is worthy of note that, it is only the International Convention on Civil Liability for Oil Pollution Damage 1992, that encompasses the circumstances that can lead to liability of environmental polluters (maritime spills from ships) and the associated grounds under which polluters could be exonerated from liability. Despite the acceptability and efficacy of this Convention, it is limited in scope. The Convention is exclusively applicable to pollution damage caused by oil spills on a 'ship',¹⁷⁷ and liability under the 1992 Convention is imposed on the registered ship-owner, and in the absence of registration, the person (s) owning the

¹⁷⁵

See figure 1.3.4.1 on Contributory or joint liability.

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See Article IV of the 1992 Convention (n 172). See also Liability and Compensation for Ship-Source Oil Pollution (n 171), para 141.

¹⁷⁷

Liability and Compensation for Ship-Source Oil Pollution (n 171), para 125.

ship would bear responsibility.¹⁷⁸ Although the principle of state responsibility regarding transboundary damage is not in doubt, it is argued that the 1992 Convention addresses the civil liability of ship-owners rather than the responsibility of states in international law.¹⁷⁹ The obligation under the principle of state responsibility is basically between states, it projects the need for sovereign states not to cause harm to others. In essence, the strict liability doctrine under the 1992 civil liability convention could be deemed to operate outside the confines of the state responsibility principle. However, the 1992 Convention could be utilised as an alternative approach to address pollution incidents of international nature, narrowly, for spills caused by ships.

In line with the above submissions, Boyle maintained that there is no global treaty on civil liability for transboundary pollution or damage.¹⁸⁰ This proposition cannot be wholly accepted since the Conventions mentioned earlier on were aimed at addressing issues of transboundary pollution. But it is admissible, to a considerable magnitude, that there is a deficiency in international law on the measure of liability required to address environmental pollution incidents. It is shown that there is reluctance in inculcating the strict liability doctrine within the ambit of the state responsibility principle. This is pursuant to the fact that not many states are willing to accept ‘a no-fault liability’ for damage caused by activities within their jurisdiction.¹⁸¹ It is against this background that the International Law Commission in its 2003 report made suggestions on the need to concentrate on harm caused for variety of reasons, and dealing directly with the issue of responsibility by “allocation of loss among different actors involved in the operations of the hazardous activities”.¹⁸² It is

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Liability and Compensation for Ship-Source Oil Pollution (n 171), para 140.

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Alan E Boyle, ‘Globalising Environmental Liability: The Interplay of National and International Law’ (2005) JEL 17 (1) 3, 4.

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Boyle (n 179).

¹⁸¹

Boyle (n 179) 6.

¹⁸²

International Law Commission Report on the Work of its Fiftty-fifth Session (5 May to 6 June and 7 July to 8 August 2003) Supplement No. 10 (A/58/10) para 168 p 108

obvious that within the context of oil and gas pollution, oil TNCs (being the actors in the oil industry) will be directly liable for pollution caused in international pollution disputes. It is submitted that states would have to develop a comprehensive legal framework for addressing liability issues with a view to apportioning liability to the appropriate actor involved in any incidence.

This is not to undermine or discourage the efforts of international law-making bodies to discountenance with the principle of state responsibility. As states in control of jurisdictions where hazardous activities have caused injury would be responsible for the purposes of identifying the source state therein, and consequently shifting liability on the real actor. But where a state, is the real actor, then liability is automatic on the state. In line with this development, the Commission can proceed to develop on existing ‘private law civil liability models.’¹⁸³ One of such legal regime under private civil liability is the 1992 International Convention on Civil Liability for oil pollution damage.

5.6.1 The Most Widely held View on the Measure of Liability for International Pollution Damage.

Having considered series of judicial cases and the contents of most international treaties, it is pertinent to decipher what measure of liability is more closely related to oil pollution damages at the international level. The determination of such issue is necessary having regard to the need to retain uniform principles of liability with a view to maintaining certainty in international proceedings. The key question here is: which principles would apply to determine liability-should liability be anchored on the strict liability doctrine, absolute liability or on due diligence? There is no doubt that the principles of strict liability as it relates to damage arising out of accidents or escape of harmful substances in potentially hazardous activities have been introduced in some international conventions,¹⁸⁴ even outside the confines of oil and gas activities.¹⁸⁵

<legal.un.org/ilc/reports/2003/2003report.htm> accessed 4 January 2015.

¹⁸³

AE Boyle (n 179) 6.

¹⁸⁴

Barry Sen, ‘Civil Liability for Injurious Consequences of Potentially Hazardous Activities—the Need for Uniform Law’ (1996) *Uniform Law Review* 1 (3) 453, 468.

¹⁸⁵

For the purposes of emphasis, a brief reconsideration of the *Trail Smelter*¹⁸⁶ arbitration, which was discussed in Chapter 1 of this research,¹⁸⁷ would be relevant. Whilst deliberating on the arbitral award in the *Smelter* case, it was clear that the Tribunal was inconsiderate on whether the Trail Smelter Company had any intention to cause damage in line with its activities. Rather, the tribunal was relatively focused on whether members of the public had suffered injury, and the likely source of the injury. This is shown when the tribunal maintained that:

... Since the tribunal has concluded that, on all the evidence, the existence of injury has been proved, it becomes necessary to consider next the cause of the injury. This question resolves itself in two parts—first, the actual causing factor, and second, the manner in which the causing factor has operated.¹⁸⁸

It is concluded that liability with regards to damage arising in the *Trail Smelter* arbitration was direct without the need to prove fault of the Smelting Company, and because there were no listed exceptions to liability in that case as could be found in *Rylands v Fletcher*, it will be appropriate to conclude that liability was absolute.

The *Trail Smelter* arbitral award was rendered in 1938, before the advent of many, if not all of the relevant and significant Conventions mentioned in this research. It follows that there could be likely changes in perception with regards issues of liability in international law. Hence, it is clear that ‘intention’ or ‘foreseeability’ of harm is a basic requirement in apportioning liability in cases of international disputes relating to dangerous harm at the moment. This is clear in the Corfu Channel Case, when the ICJ maintained that:

The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of mine-laying in her territorial waters independently of any connivance on her part in this

See Convention on Third Party Liability in the Field of Nuclear Energy (adopted in Paris, 29 July 1960), Convention on Civil Liability for Nuclear Damage (adopted in Vienna, 21 May 1963) etc.

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Trail Smelter Arbitration (United States/Canada), (1938) Vol III (Reports of International Arbitral Awards) 1905-1982.

¹⁸⁷

See figure 1.10 for a brief analysis of the Trail Smelter Arbitration.

¹⁸⁸

Trail Smelter Report (n 186) 1920-1921.

operation. The proof may be drawn from inferences of fact, provided that they leave no room for reasonable doubt.¹⁸⁹

The need to establish ‘foreseeability of harm’ in the *Corfu Channel* Case is in line with requirements under the strict liability rule,¹⁹⁰ the laws of negligence and nuisance.¹⁹¹ In absolute liability, knowledge of the likelihood of the defendant’s activities to cause harm may not be relevant, provided the defendant has caused harm to others within its territory. In essence, to establish absolute liability in the *Corfu Channel* case, the ICJ may not have bothered with whether the Albanian authority had knowledge of the laying of the mines. This stance is pursuant to the fact that if the concept of state responsibility is to be interpreted absolutely without any qualification that states are to bear responsibility to ‘ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdictions’, then the ICJ, would not have entered into further analysis with a view to ascertain knowledge of the mine laying. But even in circumstances where it is established that a party had foresight of the damage in question, the proper standard of liability could be that of a strict liability as established in *Rylands v Fletcher* or even absolute liability where there is no third-party interference.

It has been shown in the *Corfu Channel* case that mere control of the territory of a state where harm is caused to another State does not impute ‘knowledge’ or ‘fault’ on the source State. This is evident when the Court observed that:

...But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.¹⁹²

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Corfu Channel Case Judgment of (131) 18.

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See figure 1.3 on the nature and scope of the doctrine of strict liability.

191

See figure 1.4.3 on the connection between nuisance and negligence.

192

Corfu Channel Case Judgment (131) 18.

In considering the applicability of the strict liability doctrine in resolving international disputes, it is necessary to reflect that environmental polluters would be strictly liable if it can be shown that; (a) the state brought the ‘thing’ which has caused harm, (b) the state had knowledge of the likelihood of the ‘thing’ to cause damage at its escape (c) the activity is a non-natural use of land, and (d) the thing must actually escape.¹⁹³ In this vein, it is clear that in the *Corfu Channel* Case, the Albanian authority had denied having knowledge of the laying of the mines and the later explosions. In essence, all the aforementioned requirements in establishing a case of strict liability cannot be established. For it is only when the Claimant shows, through evidence, that the defendant was responsible for the ‘thing’ which later caused injury, that the other requirements can be considered.

Nevertheless, the ICJ in the *Corfu Channel* case, discovered, through indirect evidence that Albania must have had knowledge of the laying of the mines, since the Albanian government was carrying out surveillance within the territory. In this regard, liability was established against Albania for failing to prevent the disaster.¹⁹⁴

It is interesting to note that in both the tort of negligence and the common law rule of strict liability, ‘foreseeability of harm’ is a common element which must be proved to establish liability. Whilst in strict liability, it must be shown that the defendant brought the ‘thing’ which has caused damage, in negligence, it is not a requirement. In negligence, liability will arise where it is shown that the defendant has failed to exercise due care to avoid acts or omissions which could be reasonably foreseen to cause injury to his neighbour.¹⁹⁵ In the light of this gap between strict liability requirements and the elements in proving negligence, it is respectfully submitted that the ICJ utilised principles of liability in negligence in determining the culpability of Albania. Albania was liable not because they laid the mines, but because they had knowledge of the laying of the mines and omitted to prevent it, and omission to prevent a foreseeable damage would create liability in the tort of negligence.

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See figure 1.3 to ascertain the nature and scope of the strict liability doctrine.

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Corfu Channel Case Judgement (n 131) 119.

¹⁹⁵

See the case of *Donoghue v Stevenson* (n 159) (HL).

In the case of *Argentina v Uruguay*,¹⁹⁶ the ICJ affirmed that the obligation under state responsibility is that of ‘prevention’, i.e. states are to ‘use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction causing significant damage to the environment of another state.’¹⁹⁷ The Court went further to maintain that ‘prevention’ is a customary rule in international law and has its origins in the ‘due diligence’ that is required from the state.¹⁹⁸ The element of due diligence is synonymous with that of ‘due care’ as required in cases of negligence. It follows that the standard of liability under State responsibility is adjudged to be in existence in two-fold; liability is anchored within the legal framework of the tort of negligence on one hand, as well as the rule of strict liability under the Convention on Civil Liability for Oil Pollution Damage 1992 on the other.¹⁹⁹ With regard to the latter, Oosterveen had observed that the 1992 Convention applies to pollution damage in the territory of a state and it provides for strict liability of the owner of an oil tanker, with a very limited list of exceptions.²⁰⁰

5.8 Conclusions

The principle of state responsibility has been considered as a means for environmental protection both at domestic and international levels. The principle proclaims that whilst Sovereign States retain the right to exploit their own natural resources, they must ensure that activities within their jurisdictions do not cause harm to other States. Whilst it has been showcased that this principle of State responsibility is straightforward without any ambiguity, there are intricacies and challenges relating to issues of jurisdiction, the measure of liability or standard of proof through which the courts will apportion liability to an erring state. At the

¹⁹⁶

Pulp Mills on the River Uruguay (n 151).

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Pulp Mills on the River Uruguay (n 151) para 101.

¹⁹⁸

Pulp Mills on the River Uruguay (n 151) para 101.

¹⁹⁹

See the earlier discussion on the application of strict liability in the 1992 Convention on Civil Liability for Oil Pollution Damage.

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Willem Oosterveen, ‘Some recent developments regarding liability for damage resulting from oil pollution- from the perspective of an EU member State’ (2004) 6 ELR 223, 224-225.

domestic or municipal level, there seem to be challenges where incidents of pollution occur, this is because, issues of proper jurisdiction are easily resolved, and second: it is easier for a State to detect legal challenges and put in place the necessary legislation to curb it. Also, government agencies are prompt in resolving environmental challenges relating to oil and gas pollution.

At the transboundary level, the United Nations and/or other affiliated bodies have been keen to ensure that uniform rules are established in order to curb liability and compensation issues in events of environmental pollution. This desire to ensure uniformity is triggered on the grounds that where pollution is caused by the State or TNCs, which is partly owned or wholly controlled by different foreign partners in a different jurisdiction, the legal complexities in addressing such pollutions incidents could be enormous. It is noted that there are a series of conventions and protocols put in place in this regard, but it is shown that most of such conventions are precatory in nature, and this is a major challenge. Although it is admitted that, by virtue of Article 36 of the Statute of the International Court of Justice, where there is violation of an international obligation by a state, there are reparations to be made by such states in breach of such obligation.

In the light of the current legal framework in Nigeria addressing incidents of oil and gas pollution, it has been shown that liability in Nigeria is a combination of tortious liability principles in negligence, nuisance and the strict liability rule (as in *Rylands v Fletcher*). It has been identified that oil theft and illegal refining are the major causes of environmental pollution in Nigeria. Unfortunately, these two latter causes are grounds under which oil TNCs would escape liability under the law of negligence, strict liability doctrine,²⁰¹ and the extant legal framework on environmental liability in Nigeria.

It seems that the defence of ‘act of a stranger’ as applicable in strict liability cases and that of exercising ‘due care’ in negligence would no longer be a smooth ride to escape liability as it is traditionally known for. This is pursuant to the fact that oil TNCs are deemed to have possessed or made improvements in the necessary technology to curb cases of oil theft and illegal refining. This development is shown by Justice Akenhead in his ruling relating to the

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Oil theft and illegal refining are defences in strict liability. They fall under the defence of ‘acts of a stranger’, or ‘default of the claimant’, where it is shown that the victim was directly involved in the theft or illegal oil refining.

Bodo Oil Spill incidence in Nigeria which was brought before the London court against Shell PB. The court was of the view that the Nigerian Oil Pipelines Act does not hold oil operators liable for oil spills caused through theft, but the operators would be liable if they fail to install surveillance or anti-tampering equipment or if they knew the time and location of a planned attack and fail to take appropriate security measures. Although, this sounds theoretical, it will project a stricter liability against oil operators in both negligence and strict liability principle.

The issue of liability in oil and gas pollution incidents under state responsibility at the international level has been adjudged to be the one of ‘prevention’, i.e. states would be liable for want of due diligence where they fail to take appropriate measure to prevent a foreseeable injury against their neighbouring states. This has been shown by the ICJ in both the *Corfu Channel* case and that of *Argentina v Uruguay*. In essence, liability under the principle of state responsibility seems to be more closely connected to liability in the law of negligence. But this position of the ICJ is argued to be erroneous. The reason being that a foreseeable damage ought to attract a strict or absolute liability, provided there was no third-party interference. Owing to this, the ‘due diligence’ requirement in the *Donoghue* case as well as in *Argentina v Uruguay*, for foreseeable damages can no longer stand the test of time, particularly in international law relating to state responsibility.

In another perspective, the doctrine of strict liability is conspicuously seen to be applicable in the 1992 Convention on Civil Liability for Oil Pollution Damage. This Convention is exclusively applicable to registered ship-owners who are found to have discharged oil at sea. In circumstances where the ship is not registered, liability will be traced to the person (s) owning the ship, and in line with Article 1(2) of the 1992 Convention, ‘person’ includes states or corporations owned by the state.

It is stated that there are adequate Conventions or Treaties to address the measure of liability applicable in damages sustained in oil and gas pollution cases, but these documents will be more useful if they are captured into municipal laws. Although, there are sectorial Conventions addressing isolated cases of pollution at the international level, such as the International Convention on Civil Liability for Oil Pollution Damage 1992, to which Nigeria and the United Kingdom are signatories,²⁰² there is the need to address liability issues in oil and gas pollution globally, both onshore and offshore. The International Law Commission

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(ILC) in its 2003 Report on International Liability in case of Loss from Transboundary Harm Arising out of Hazardous Activities,²⁰³ made recommendations to deal with liability issues by allocating losses among different actors involved in the operations of Hazardous activities. This implies that the ILC is more inclined to address liability issues on an individual basis rather than on the concept of state responsibility. Notwithstanding, it is submitted that the concept of state responsibility, although a principle of international law, should be applied in two categories; both intra and inter-state. That is, as states are under obligation not to cause harm to other states, a state should maintain such obligation not to cause harm to her citizens.

In the next chapter, the argument for absolute liability in fundamental rights enforcement with regards environmental pollution caused by oil and gas activities of TNCs is raised; it is a dialectic, taking into consideration the legal and economic implications of what has been discussed in previous chapters, as well as the relevance of legal principles mentioned in the current chapter. In a nutshell, the crux of chapter 6 is to determine whether the standards of liabilities in the torts of negligence, nuisance and under the strict liability rule can be transformed into absolute liability in incidents of environmental pollution relating to breach of fundamental rights of individuals in incidents of environmental pollution.

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CHAPTER 6

ABSOLUTE LIABILITY FOR ENVIRONMENTAL POLLUTERS UNDER FUNDAMENTAL RIGHTS ENFORCEMENT PROCEEDINGS: A DIALECTIC

6.1 Introduction

In the last five chapters of this research, it has been shown that a pollution-free environment is inevitable for a healthy living and the sustenance of mankind. This is particularly shown in the course of case law analysis and general discussions on fundamental rights as a vehicle for environmental protection in figures 2.3 and 2.5 of this research. In view of this, governments at various levels have put in place adequate legislation and policies, even adopting regional and international treaties and conventions with a view to curtailing dangerous activities by entities seen to be causing harm to humans and the immediate environment,¹ and where such harm cannot be prevented, corrective measures are taken in the way of payment of damages and compensation to victims.² This is obtainable both in common law principles of liability in tort actions and fundamental rights enforcement proceedings.³

More light has been thrown on common law tort principles of environmental liability, particularly in nuisance, negligence and under the strict liability rule. It is shown in the aforesaid principles, that there is greater burden on the claimant to show that the defendant acted recklessly, unreasonably and or had a reasonable foresight of the harm caused amongst others. It is argued that the aforementioned standards of proofs and defences are dictates of various statutory provisions and conventional common law rules which are applicable in Nigeria; and in practical terms are no longer serving the purpose for creating a quality environment due to their ‘vague and arbitrary applications’, and in most cases, the technicalities involved are cumbersome, hence, the need to explore a new approach. In view of these shortcomings, Kalu and Stewart have reasoned that:

1

The Nigerian government adopted the African Charter on Human and Peoples Rights into domestic law, likewise the UK adopted the European Convention on Human Rights into domestic law.

2

See figure 5.5 on ‘Compensation regime and issues of environmental liability in international law’.

3

See figure 1.7 on a critical analysis of the strict liability rule and its applicability in Nigerian oil and gas pollution liability regime.

Litigation in regular courts have not helped the situation. This is primarily because the highly scientific, technical and sophisticated nature of the operations of oil companies makes it imperative for a plaintiff to be well versed in this area to be able to recover damages for his losses in suits for compensation or negligence.⁴

It is submitted that where a legal enactment is silent on any excuse or qualification to be raised by environmental polluters, it is presumed that liability will be absolute,⁵ and this is the premise for the argument of an absolute liability regime within the framework of environmental rights enforcements through the instrumentality of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the African Charter on Human and People's Right (Ratification and Enforcement) Act 2004.

Even if these legal instruments are not feasibly categorical on the rights to a safe environment, it is shown that there is no incompatibility between environmental pollution incidents and fundamental rights violations, particularly the rights to life, dignity of human person and private and family life. Rather, it is shown that environmental safety and the aforementioned rights are inextricably interwoven.

The term 'absolute,' in ordinary legal usage, connotes 'without conditions or restrictions.'⁶ In the same vein, The Oxford Dictionary of Law defined 'absolute rights' within the ambit of environmental rights, as:

A right set out in the European Convention on Human Rights that cannot be interfered with lawfully, no matter how important the public interest in doing so might be. Absolute rights include freedom of thought, conscience, and religion and the prohibitions on torture, inhuman treatment or punishment, and degrading treatment or punishment.⁷

4

Victoria E Kalu and Ngozi F Stewart, 'Nigeria's Niger Delta Crises and Resolution of Oil and Gas Related Disputes: Need for a Paradigm Shift' (2007) 25 JENRL 244, 253.

5

See figure 6.4.1 on the technical meaning of the term Absolute and its usage within the framework of fundamental rights violations.

6

Leslie B Curzon, Dictionary of Law (6th edn pearson education 2002) 2. Other legal meanings attached to the term are fully discussed in figure 6.4.1.

7

Elizabeth A Martin (ed), *Oxford Dictionary of Law* (5th edn, OUP 2003) 3.

In the light of this, it is observed that a combined reading of certain fundamental rights provisions relating to the right to a clean environment appears not to be subject to any limitation, or better still, they are unconditional within the framework of environmental pollution, and can be considered as ‘absolute rights’, particularly in the Nigerian legal system. It is observed that the constitutional defences (in the Nigerian Constitution) relating to the rights to life, dignity of human person and rights to private and family life would not avail polluters themselves in matters pertaining to fundamental rights enforcement.

Although, regional judicial institutions in Africa have given much credence to certain defences which could vindicate polluters when they exhibit precautionary measures, vigilance and diligence in handling activities of oil and gas; a different scenario seems to play out at the national level. Nigerian courts have applied liability principles in the tort of negligence and have equally affirmed to principles of strict liability as found in *Rylands v Fletcher* in claims of oil spill damage, and a federal high court even exhibited a stricter liability in fundamental right enforcement proceeding relating to environmental pollution by declaring the defence of acting through ‘statutory authority’ to be incompatible with constitutional rights to clean and pollution free environment.⁸ The only shortcoming of the aforesaid judgement is that it is yet to go on appeal for further validity test; but it is common knowledge that when the environment is polluted or is threatened with pollution, the rights to life and dignity of human person as well as private and family life are violated or likely to be violated, and it would be difficult to upturn or discountenance such a standpoint bearing in mind the growing support environmental rights have garnered globally. Oil transnational corporations operating in the Niger Delta region of Nigeria have been described as ‘bad parasites’ in that they carry on business in the area below internationally allowed recognised environmental standards,⁹ and this has incredibly affected the enjoyment of a peaceful and pollution-free environment. In view of this, Atsegbua had observed that ‘the denial of the existence of environmental rights is primarily responsible for the underdevelopment of the

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See Jonah Gbemre (*for himself and as representing Iwherekhan Community in Delta State, Nigeria*) v *Shell Petroleum Development Company Nigeria Ltd and others* [2005] AHRLR 151 (Federal High Court, Benin Judicial Division) as discussed in figure 6.4.

9

Lawrence Atsegbua, ‘Environmental rights, pipeline vandalism and conflict resolution in Nigeria’ (2001) IELTR 5, 89.

Niger Delta area.’¹⁰ This explains the rationale for the advancement of fundamental rights to a safer environment in Nigeria as discussed in the current chapter.

Hence, this chapter forms the focal point of the entire research, in that it examines whether the doctrine of absolute liability will be applied to the principle of the protection of the environment in cases of fundamental rights violations. It is observed that the constitutional rights to life and dignity of person, which have been creatively and expansively interpreted to include environmental rights, are to a large extent considered absolute rights. But the target is not to merely impose an absolute liability on oil transnational corporations just for the sake of obtaining bogus compensations or damages, but to ensure a higher sense of responsibility on the part of government and oil operators. In fact, it is not necessary that damages are awarded; provided the courts make proper decisions to curtail any form of environmental harm. Even as the argument for an absolute liability is projected, credence is given to John Gordon’s advice on maintaining moderate approaches to environmental liability issues as quoted in Abel’s article.¹¹ Gordon aptly stated that:

I suggest there is little profit for anyone in extreme positions. Resource development must go on; otherwise we shall all starve. The environment must be protected; otherwise man and all living things will perish.¹²

In view of the foregoing, judicial pronouncements from foreign jurisdictions, such as the European Court of Human Rights, England and Wales, and Indian courts are deployed with a view to comparing and assessing current trends and dynamics in incidents of environmental pollution and fundamental rights violations. This approach is pertinent due to limited case-law on the aforesaid area of law in Nigeria. At the moment, the *Jonah Gbemre* case¹³ remains the only judicial pronouncement linking environmental pollution caused by activities of oil and gas TNCs to breach of fundamental rights of inhabitants in Nigeria, with a stiffer

¹⁰

ibid 90.

¹¹

Wolman Abel, ‘Global Pollution and Human Rights’ (1972) 12 NRJ 195.

¹²

Abel (n 11) 201.

¹³

Jonah Gbemre (n 8).

standard of liability which has raised the argument for an absolute liability. However, in *FA Akpan & Anor v Royal Dutch Shell & Anor*,¹⁴ a Dutch High Court, whilst adjudicating on environmental liability issues raised by Nigerians against Shell has reasoned that no Nigerian ruling in which event of sabotage by third parties is considered to be an infringement of a human right.¹⁵ This latter position deserves support only to the extent that the Federal High Court in the *Jonah Gbemre* case¹⁶ did not tackle the issue of pollution incidents caused by ‘third parties’, and the standard of liability to be applied against TNCs in events of sabotage remains ambiguous. In view of the foregoing, it is maintained that, on a scale of zero to ten (0-10), where 5 represents ‘strict liability’ and 10 represents ‘absolute liability’, environmental liability under fundamental rights enforcement, as argued in the current research should be pinned under 9, with limited space left for illegal activities of ‘third parties’ where pollution is shown to be manifestly unavoidable, in events relating to illegal oil bunkering and acts of sabotage by vandals. But even here, it is argued that liability ought to be absolute in that such activities of ‘third parties’ are foreseeable, and if TNCs are proactive and diligent enough in curbing pollution, they would forestall such acts of third parties.¹⁷ With this development, the current chapter showcased a gradual transformation of traditional rules of liability in negligence, nuisance and under strict liability to an absolute liability in circumstances where environmental pollution is shown to infringe on the aforementioned fundamental rights of citizens. To this extent, absolute liability and ‘stricter’ liability are used interchangeably; the reason being that the standard of liability in actions relating to fundamental rights violations, with particular analogy from the *Jonah Gbemre* case has projected a stronger liability than the traditional strict liability rule.

¹⁴

District Court of The Hague Case No. C/09/337050/HA ZA 09-1580, 30 January 2013 <<https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-shell-oil-spill-ikot-ada-udo>> accessed 12 January 2016.

¹⁵

ibid 4.56.

¹⁶

Jonah Gbemre (n 8).

¹⁷

See the *Bodo Community Case* (n 24) [93] on the ‘theoretical possibility’ for a stricter liability against TNCs where damage is foreseeable and preventable.

6.2 The Polluter Pays Principle (PPP): The Rio Declaration 1992

The Nigerian National Policy on the Environment captures the ‘polluter pays’ principle; it succinctly puts that ‘...the polluter should bear the cost of preventing, and remediating pollution’.¹⁸ This seems to be suggestive of an absolute liability on the polluter, but the provision appears to fall short of a comprehensive statement, thereby, creating ambiguity on how it is to be applied to practical situations in events of environmental pollution. It follows that, there is doubt on whether applicable standards of proofs on common law principles of environmental liability and provisions of statutes pertaining to environmental liability in Nigeria (the most common is negligence and lack of reasonability in handling oil and gas activities) as discussed earlier¹⁹ are to be ignored or not. The use of the word ‘should’, in the Oxford Dictionary connotes ‘obligation or duty’ as well as ‘a desirable or expected state’. With regards to the precatory nature of the National Policy on the Environment, it would easily be submitted that the polluter pays principle is a desire rather than an obligation on the polluter in the Nigerian environmental liability framework.

At the international level, the polluter pays principle is equally seen in the Rio Declaration on Environment and Development.²⁰ Principle 16 of the Declaration provides that:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.²¹

In light of the above principle, the polluter pays principles best represents an administrative monetary policy against polluters rather than a judicial concept. This is because there is a

¹⁸

The Nigerian National Policy on the Environment ‘Guiding Principles’ Figure 1.5 p 6.

¹⁹

See figure 5.3.3 on provisions of the Oil Pipelines Act, particularly section 11(5)(b) which deals with payment of compensations on grounds of negligence and the lack of reasonability in handling oil and gas activities.

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United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) A/CONF. 151/26 Vol 1.

²¹

ibid.

greater emphasis on the use of economic instruments in determining the costs of pollution.

Ward and Hicks have defined the polluter pays principle as:

...The commonly accepted practice that those who produce pollution should bear the costs of managing it to prevent damage to health or the environment. For instance, a factory that produces a potentially poisonous substance as a by-product of its activities is usually held responsible for its safe disposal.²²

From the technical and literal meaning of the concept, the 'polluter pays' principle may not be associated with any qualifications. For instance, will the polluter pay where the pollution is caused by an act of a third party, or where the polluter acted reasonably, or was not negligent? It is submitted that this could be answered in both the affirmative and negative. When answering in the affirmative, attention can be given to instances where the polluter pays principle is implemented in jurisdictions where environmental rights can be perceived as absolute and/or where statutory provisions ignores or are silent on the aforesaid defences. In the former, the polluter may witness challenges in raising a defence not to pay where the fundamental right to life and other associated rights are interpreted to include environmental rights without limitations (particularly in an absolute liability regime).²³ In the latter, where statutory provisions are silent on any defence, the court may exercise its discretion in any direction.

Whilst answering in the negative, it is plausible to emphasise that the vast majority of liability principles abhors liability where polluter acted reasonably and where pollution is caused by acts of sabotage; this is because it is technically unjustifiable to 'compensate' for damage that was not done with intention. The case of *Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd*²⁴ is instructive in this regard. A London High Court (in London) raised the issue 'whether SPDC can be liable under section 11(5)(b) of the Oil

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Bob Ward and Naomi Hicks, 'What is the "Polluter Pays" Principle?' (Grantham Research Institute at London School of Economics in collaboration with the Guardian) *The Guardian* (London, 2 July 2012) <<https://www.theguardian.com/environment/2012/jul/02/polluter-pays-climate-change>> accessed 14 August 2015.

²³

This is seen in the decision of the Indian Supreme Court in *MC Mehta v Union of India*[1987] AIR SC 1086.

²⁴

[2014] EWHC 1973 (TCC) (see issue 2). See also the discussion in figure 5.4.

Pipelines Act 1990 to pay just compensation for damage caused by oil from its pipelines that has been released as the result of illegal bunkering and/or illegal refining?’ The Court resolved the issue in the negative. For the sake of clarity, section 11(5)(b) of the Oil Pipelines Act in Nigeria places responsibility on oil operators to pay compensation to any person suffering damage by reason of neglect to protect, maintain or repair any work or thing executed under the licence. Similar judgments of this sort have been decided based on common law principles of liability and statutory provisions.

However, it would be herculean and/or almost impossible act for polluters to abscond liability (particularly on the need to compensate those who suffered severe injuries) of any sort, in incidents where damages are done in large scale. For instance, in the Deepwater Horizon Oil Rig Blowout which discharged millions of barrels of oil into the Gulf of Mexico, BP had denied any form of liability, but had maintained that its contractors, Transocean and Halliburton should retain responsibility, being the contractors directly involved in the major spill. Regardless of this, a U.S. District Court had identified BP as the major culprit, and that BP had acted with ‘conscious disregard of known risks, and its conduct was reckless.’²⁵ This apparently reveals a case of negligence on the part of Shell BP. But it would be expedient to note that there is hardly a case of major oil spill that will not have elements of negligence in it, no matter how small, for claimants to rely upon; for recklessness can be anchored on inadequate maintenance of oil pipelines or other major equipment, poor training of staff and issues bordering on inefficiency in securing oil facilities.²⁶

Furthermore, in resolving the practicability or effectiveness of the Polluter Pay Principle (PPP), one would have to consider the existing principles on liability in the relevant jurisdiction. That is, where liability is not absolute by virtue of statutory or common law provisions on environmental pollution caused by oil and gas, then, the polluter pays principles (PPP) may not be seen to override such existing laws since the PPP is basically a policy (as contained in the National Policy on Environment) subject to domestic laws.

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Campbell Robertson and Clifford Krauss, ‘BP May Be Fined Up to \$18 Billion For Spill in Gulf’ *New York Times* (New York, 4 September 2014) <http://www.nytimes.com/2014/09/05/business/bp-negligent-in-2010-oil-spill-us-judge-rules.html?_r=0> accessed January 2016.

26

It has been established in *Bodo Community v SPDC* [2014] EWHC 1973 (TCC) [93] (Justice Akenhead) as discussed in Figure 5.4 that Shell does have potential liability if it neglects in the protection of its pipelines which results to damage, particularly where such neglect is one that is preventable.

However, the PPP can be seen as underpinning most of the regulation or legislation on pollution affecting land, water and air, especially on issues relating to oil clean-ups. Unequivocally, it is in tandem with ordinary logic that ‘he who pollutes should pay for it’.

In the light of the above, there would be a small gap between the ‘polluter pays’ principle and the doctrine of absolute liability. Technically, and within the context of the current research, the doctrine of absolute liability depicts circumstances where there are no known or stipulated excuses under the law where a polluter would rely upon as a defence to escape liability. In essence, even if there are certain exceptions under a particular legal provision but cannot be utilised by the polluter, or are not relevant to the subject matter, thereby barring the polluter to rely on it, then, it is maintained that liability is absolute. For instance, section 33 of the Nigerian Constitution makes provision for the right to life, and that no one shall be deprived of his right to life except in the execution of the sentence of a Court in criminal offence; for the defence of any person from unlawful violence or property; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or for the purpose of suppressing a riot, insurrection or mutiny; and then bearing in mind the understanding that the right to life can be creatively and expansively interpreted to include environmental rights, then, it could be argued that oil transnational corporations (TNCs) involved in oil and gas pollution would not be legally privy or obliged to raise any of the aforementioned defences since they are not in any-way relevant to the context of oil and gas pollution. This inevitably creates an absolute liability on the polluter.

It follows that whilst the ‘polluter pays’ principle is to be materialised through a scientific or policy to impose liability, particularly within the ambit of monetary costing of polluters in line with the magnitude of pollution, the doctrine of absolute liability is specifically related to legal or judicial proceedings placing liability on the polluter in circumstances where the law does not provide a means of excuse. However, both the PPP and the doctrine of absolute liability are targeted towards ensuring that the polluter takes charge of compensation, environmental remediation and consequently reduce pollution; and in this vein, may be considered synonymous.

From the foregoing, it would be pertinent to keep in mind that the primary aim in the current research is to examine whether the doctrine of absolute liability may be applied to the principle of the protection of the environment in cases of fundamental rights violations, and this is quite different from the issues of compensation, carbon pricing and environmental

remediation as could be seen to be the primary targets of the common law tort principles of liability discussed herein and the polluter pays principle. Albeit it is certain that the end effect of imposing an absolute liability on the polluter within the ambit of fundamental rights enforcement is to achieve the latter objectives, and even more importantly to secure human lives; the current research borders on the measure of liability in fundamental rights enforcement proceedings, thereby deserving more technicality and attention (at present, there is only one known complete decision bordering on environmental pollution and fundamental rights violation)²⁷ than can be seen in the vague concept of the polluter pays principle and more strictness than can be seen in the common law liability principles of negligence, nuisance and strict liability.²⁸ It follows that the ‘polluter pays’ principle, the doctrine of strict liability and the doctrine of absolute liability cannot be used interchangeably. However, the common law principles of liability as mentioned, and the polluter pays principle are not to be undermined in any form, particularly when embodied in documents with legal backings, whether at state or international levels, but are knowingly discussed with a view to compare the concept of absolute liability within the framework of fundamental rights violation in events of environmental pollution.

6.3 The Rationale for an Absolute Liability Regime

It has been shown the growing and vast existence of binding legal provisions addressing issues of environmental pollution caused by oil and gas activities of TNCs. Also, the economic importance of the activities of oil TNCs have been highlighted in previous chapters, specifically in chapter 3. It is shown that there is a prevailing conflict of interest between the absolute liability doctrine which would gain the support of victims of environmental pollution and the economic benefits (from oil exploration) of the state as well as the TNCs (the polluters). The question is, why promote or raise the argument for absolute liability in cases of environmental pollution? In Nigeria, the menace of environmental pollution caused by activities of oil and gas of TNCs, are clearly grim and reports of its effect on the immediate environment as well as inhabitants is globally recognised. A report

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See *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd and others* [2005] AHRLR 151 (Federal High Court).

²⁸

It is trite that fundamental rights claims are generally given an enhanced status above other claims due to their significance to life and well-being of the individual. See discussion in figure 2.5 on ‘awareness of human rights as a tool for environmental protection in Nigeria’.

published by the United Nations Environment Programme in 2011 on environmental assessment of Ogoni land²⁹ (an oil producing area in the Niger Delta) clearly affirms a staggering quantum of degradation on the environment. It was admitted that pollution caused by crude oil spills is widespread, affecting land areas, sediments and swampland, and this has happened in recent times and over a period of decades.³⁰ The content of the Report is incredibly heart rending, and clearly reveals a case of neglect and lack of environmental responsibility for oil spills on the parts of TNCs and government. It is noteworthy to point out that the report covered only a modicum of geographical landscape of the series of incidents of oil spills and its impact in the Niger Delta region.

The Nigerian Senate disclosed that Nigeria has the highest number of oil spill incidences among oil producing countries with no penalty regime attached to such oil spills.³¹ For such disclosure to emanate from the country's apex law-making body; there is little doubt that the existing laws on environmental pollution, which some have been discussed in chapter 5 of this research are ineffective. To allege that there is no penalty regime would amount to exaggeration; the truth lies in the many challenges (mostly on the economic grounds and lack of awareness on environmental issues raised in Chapters 3 and 4 respectively, as well as the difficulties encountered in proving negligence on the part of TNCs) bordering on lack of will-power on the part of the executive and unwillingness of the judiciary to apply existing laws in strict sense. Although, it is likely that allegations of corruption can be linked to these situations, it is explained in chapter 3 of this work that the government is mindful not to be extremely harsh on oil transnational corporations in order not to frustrate their activities, since crude oil production remains the mainstay of the economy.

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United Nations Environment Programme, 'Environmental Assessment of Ogoni Land' (2011) DEP/1337/GE

30

ibid 207.

31

Henry Umoru, 'Nigeria has highest oil spill in the world' Vanguard News (Nigeria, 14 November 2012) <<http://www.vanguardngr.com/2012/11/nigeria-has-highest-oil-spill-in-the-world-senate/>> accessed 15 August 2015.

Whilst declaring open a public hearing on National Oil Spill Detection and Response Agency (NOSDRA) Amendment Bill 2012 by the Senate Joint Committee on Environment and Ecology, the then Chairman of the Committee, Bukola Saraki observed that:

The statistics of oil spills in Nigeria is shameful; the impact on the environment is offensive. It can no longer be business as usual. Without a doubt, oil spillage is dealt with all over the world as an environmental issue and a human right issue that goes to the quality of the environment and the value of life of those impacted by spills.³²

The above remark underpins one of the key hypotheses of the current research, which is to examine ‘whether the doctrine of absolute liability may be applied to the issue of the protection of the environment when the protection has been disregarded by TNCs within the ambit of fundamental rights enforcement’. It is observed that if the doctrines of strict liability as seen in *Rylands v Fletcher*, standards of proof in negligence and nuisance are applied by the courts in cases of compensations and enforcement of ordinary rights, there would be a need for a stricter liability, even absolute, for the enforcement of fundamental rights (environmental rights) as contained in the Nigerian Constitution and the African Charter. Although, it is borne in mind that liability principles may not be the only tools to address pollution problems, a stricter liability regime would engender oil companies, including government to improve on responsibility.

Gaines had observed that:

Environmental liability cannot effectively correct every instance of transnational environmental damage that threatens regional and global ecosystems. Neither can liability function as the principal legal device for the articulation and enforcement of standards of behaviour to protect the environment.³³

The observation by Gaines above that environmental liability principle cannot effectively correct every instance of environmental damage is worthy of support. This is pursuant to the fact that TNCs are in better positions to deploy state of the art measures (including utilisation of modern equipment) in ensuring better safety and less substantial incidences of oil spills, thereby making liability principles less relevant. On the other hand, to conceive that

³²

Umoru (n 31).

³³

Sanford E Gaines, ‘International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?’ (1989) 30 HILJ 311, 315-316.

environmental liability is not the principal legal device for the enforcement of standards of behaviour to protect the environment cannot be holistically entertained. In developing countries where environmental pollution is unrelentingly harsh, as is the case in Nigeria, there is no gainsaying that principles of liability would function as the principal legal device for enforcing environmental standards and protecting the environment. Notwithstanding, Gaines had admitted that ‘...if carefully designed and selectively applied, liability doctrines can contribute significantly to the evolving world norms of an environmental stewardship, and to the compensatory transfer of resources where appropriate.’³⁴

Considering the observation above, it is certain that an absolute liability regime would ensure a more transparent, accountable and efficient compensation regime, than the arbitrary and isolated application of common law principles as shown in chapter 1. However, it must be admitted that oil spills are inevitable in the course of oil and gas exploration and production, and there are instances where minor spills can be ignored, particularly where no substantial harm is caused. But even with such minor spills, a case can still lie where damage is done.

In the light of the above, the basis for the doctrine of absolute liability in fundamental rights violations and enforcements in instances of environmental pollution is easily anchored on the fact that ‘fundamental rights’ are given an enhanced status over and above other rights and claims as recognised by the Nigerian Constitution and related laws; and in this regard, there would be need to tighten the standard of liability against polluters in order to ensure maximum respect and protection of environmental rights and human dignity. This, again, would spur a higher responsibility on environmental remediation and other clean-up measures of oil spills. In this vein, Bukola Saraki (in the Nigerian Senate) had maintained that due to lack of penalties and cost framework much of the spills in Nigeria have been ‘ignored, neglected and in most cases never cleaned up or the sites remediated’.³⁵

6.4 Fundamental Rights Violation in Environmental Pollution Incidents in Nigeria: A Case for an Absolute Liability against Oil Transnational Corporations.

Some countries place more emphasis on issues relating to environmental pollution by including certain enforceable provisions in their Constitution, thereby creating liability on

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Sanford E Gaines (n 33).

³⁵

Umoru, Vanguard (n 31).

environmental polluters, but others do not.³⁶ In Nigeria, there are provisions, directly and indirectly relating to the protection and preservation of the environment, which are enshrined in the Constitution of the country. The most direct provision is embodied in Chapter II of the Constitution of the Federal Republic of Nigeria.³⁷

In considering the provision of the Nigerian Constitution on the protection of the environment, section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides, that: ‘The state shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.’³⁸ One unfortunate thing about the aforesaid section on environmental safety is that it falls within the ambit of Chapter II of the Nigerian Constitution, entitled, ‘Fundamental Objectives and Directive Principles of State Policy’, and are generally not enforceable owing to the fact that they are mere ‘directives’ to be complied with by the government,³⁹ as the aforesaid provisions under Chapter II are rendered unenforceable by virtue of section 6(6)(c), which provides that:

The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this constitution.⁴⁰

In the Nigerian case of *Attorney General of Ondo State v Attorney General of the Federation*,⁴¹ it was held by the Supreme Court of Nigeria, inter alia, that the Nigerian Courts

³⁶

EE Okon, ‘The Environmental Perspective in the 1999 Constitution’ (2003) 5 ELR 256. The author mentioned that the Indian Constitution contains enforceable provisions on environmental pollution.

³⁷

ibid.

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Constitution of the Federal Republic of Nigeria 1999 (as amended), s 20.

³⁹

EE Okon (n 36) 256.

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Nigerian Constitution (n 38), s 6(6)(c).

⁴¹

do not possess the jurisdiction to entertain or enforce cases brought under the provisions of Chapter II of the Constitution except the National Assembly has enacted specific legislation on the enforcement of such aspect of Chapter II. The Supreme Court further stated that the 'Objectives and Directive Principles' are only constitutional policies of governance and remain mere declarations which cannot be enforced. The provision, under Chapter II of the Constitution appears to be a benchmark with which the Nigerian government can improve and make specific laws in such areas.

In the light of the above, section 20 of the Constitution of the Federal Republic of Nigeria did not create any issue of liability on environmental polluters, but only set guidelines on areas of environmental law that should be legislated upon. But supposing the aforementioned section of the Constitution was to be enforceable, it would have been the most reliable sword for victims of oil and gas pollution to obtain compensation since the Constitution contains the supreme law of the land. In this regard, the Nigerian Constitution is said to have disappointingly resulted in a legal mirage.

The provision of section 20 of the Nigerian Constitution is not the end to constitutional mandate on environmental safety in Nigeria. Section 33(1) of the Constitution provides that, 'Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.'⁴² The other qualifications under this right are in circumstances where the individual dies as a result of the use of reasonable force as permitted by law for the defence of any person from unlawful violence or for the defence of property, or in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, or for the purposes of suppressing a riot, insurrection or mutiny.⁴³

Furthermore, section 3(1) of the Nigerian Constitution provides that, 'Every individual is entitled to respect for the dignity of his person, and accordingly-no person shall be subjected to torture or to inhuman or degrading treatment.'⁴⁴ An in-depth look at both sections 33(1)

[2002] 9 NWLR (Pt 772) 222.

⁴²

Nigerian Constitution (n 38), s 33(1).

⁴³

Nigerian Constitution (n 38), s 3 (2) (a), (b) and (c).

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and 34(1) reveals that no mention is made to environmental protection. It could be argued that parliament had no intention to include environmental rights to the afore-mentioned provisions of the Nigerian Constitution. But such presumption is rebuttable as further in-depth look is considered in current trends in the Nigerian legal system.

For the purposes of appreciating the entire legal regime in Nigeria as regards fundamental rights based argument for environmental protection, it is pertinent to have a full picture of the statutory enactments that forms the basis for any fundamental rights claim. It is worth reiterating that Nigeria has incorporated into its legal system the African Charter on Human and People's Rights ('the African Charter').⁴⁵ The provisions of the Charter which stands to be more relevant are Articles 4, 5, 16 and 24; and these rights, under the African Charter are fundamental. The Fundamental Rights (Enforcement Procedure) Rules 2009⁴⁶ has defined 'fundamental right' to mean any of the rights provided for in Chapter IV of the Nigerian Constitution as well as the rights stipulated in the African Charter.⁴⁷

Article 4 provides, thus: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' This provision is in par with sections 33(1) and 34(1) of the Nigerian Constitution mentioned above. Whilst sections 33 and 34 of the Constitution embodied certain circumstances (qualifications) under which an individual may be deprived of its rights to life and dignity of the person, Article 4 of the Charter is silent, thereby suggesting that the right as contained in Article 4 may be absolute. But this latter position (absolute right of Article 4) could be discountenance with, taking into consideration the word 'may,' which suggests that circumstances could arise where individuals would be deprived of the right as contained therein. In the communication of *Social and Economic Rights Action Centre (SERAC) and*

ibid, s 34(1) (a).

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The Charter, as incorporated in Nigeria is now known as the African Charter on Human and People's Right (Ratification and Enforcement) Act Cap A9 LFN 2004.

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In light of the discussions in chapter 2, there are 'Human Rights' as well as 'Fundamental Rights', and the 2009 Rules, being a guide for enforceable rights, is couched as 'Fundamental Rights (Enforcement Procedure) Rules'.

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FREP Rules 2009, Ord I, r 2.

Another v The Federal Republic of Nigeria,⁴⁸ as well as *Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria*,⁴⁹ The African Commission and the ECOWAS Court of Justice respectively, appears to predicate environmental liability in the African Charter regime to principles of negligence, that is, States are not liable where care, vigilance and diligence are exhibited towards preventing environmental pollution. However, this reasoning does not reflect in the case of *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd and others*,⁵⁰ decided by a Federal High Court in Nigeria. These cases are fully discussed below.

An important point to note is the supremacy of the Nigerian Constitution amongst other statutes. In announcing the supremacy of the Nigerian Constitution, section 1(1) provides: 'This constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal republic of Nigeria'. In furtherance, section 1(2) provides that 'If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.' Although there is no contradiction between sections 33 and 34 of the Nigerian Constitution and that of Article 4 of the Charter, the point to grasp here is that the various exceptions to sections 33 and 34 of the Nigerian Constitution would be transplanted to cover that of Article 4 of the Charter, since the Charter is silent on any exceptions to the Article 4 rights.

Article 5 of the Charter⁵¹ provides for the right to respect of the dignity inherent in a human being and prohibits all forms of exploitation and degradation which includes slave trade, torture, cruelty, inhuman or punishment and treatment. Again, this Article is in conformity with section 34 of the Nigerian Constitution which maintains the right to dignity of the

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[2001] AHRLR 60 Communication 155/96, decided at the 30th ordinary session, October 2001 of the African commission.

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[2012] Community Court of Justice, ECOWAS (Judgment N0 ECW/CCJ/JUD/18/12).

⁵⁰

[2005] AHRLR 151 (Federal High Court of Nigeria, Benin Judicial Division).

⁵¹

African Charter (n 45), art 5.

human person. Furthermore, Article 16 provides that ‘Every individual shall have the right to enjoy the best attainable state of physical and mental health.’ This provision, in the Charter, again is absolute, without any qualifications. This provision, unlike Article 4 and 5 of the African Charter, has no alternative in the Nigerian Constitution. This suggests that Article 16 is unique and independent in the context of fundamental rights as discussed in this research. Finally, Article 24 provides that ‘All peoples shall have the right to a general satisfactory environment favourable to their development.’ It is interesting and noteworthy to point out that Article 24 of the Charter is the most explicit, and devoid of any ambiguity as it relates to the fundamental right to a safe environment. More importantly, Article 24 is absolute in the sense that there are no qualifications under which an individual can be denied of a satisfactory environment.

The main question, here, is: what amounts to a satisfactory environment? The Charter is silent in this regard, but in determining what could amount to a ‘satisfactory environment,’ the court would take the circumstances of the parties into consideration. It is expressed that the dangerous activities of the respondent as well as the damage or likelihood of damage on the immediate environment of the applicant would be given credence in determining whether the environment has been rendered unfit for comfortable habitation. This may likely require reports based on environmental impact assessment by experts with a view to ascertaining the immediate effect of spills on inhabitants. Furthermore, the greater burden will be on the applicant to showcase the extent of injury or damage suffered, or the foreseeable threat on his person. It would be necessary to give a considerable attention to ‘case-law’ in order to decipher the current trend of the above mentioned laws as applicable in Nigeria.

In setting the legal regime for fundamental rights actions to be commenced under the Nigerian Constitution and the African Charter, the Fundamental Rights Enforcements Procedure Rules provides that:

Any person who alleges that any of the Fundamental Rights provided for in the Constitution or the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or is likely to occur, for redress.⁵²

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In the communication of *Social and Economic Rights Action Centre (SERAC) and Another v The Federal Republic of Nigeria*,⁵³ the complainants forwarded a communication before the African Commission alleging that the military government of Nigeria has been directly involved in oil production through the State oil company, the Nigerian National Oil Petroleum Corporation (NNPC) in a consortium with Shell Petroleum Development Corporation (SPDC), and that these operations have caused environmental degradation and health problems resulting to the contamination of the environment among the Ogoni people of the Niger Delta in Nigeria.⁵⁴ The applicant acting through *actio popularis* (a lawsuit brought by a third party in the interest of the public), further averred that the government has not required oil companies or its agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production, despite the obvious health and environmental crisis in Ogoni land.⁵⁵ The respondent admitted the gravamen of the complaints but states that the new civilian government has embarked on certain measures to remedy the damage caused by the oil activities in Ogoni land.⁵⁶ After series of adjournments, the African Commission found the Nigerian government to have violated articles 4, 16, 24, among others, of the African Charter.⁵⁷ In its final ruling, the Commission stated that:

These rights recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.⁵⁸

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[2001] AHRLR 60 Communication 155/96, decided at the 30th ordinary session, October 2001 of the African commission.

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SERAC v FRN (n 53) [1].

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SERAC v FRN (n 53) [5].

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SERAC v FRN (n 53) [30].

⁵⁷

ibid [70].

⁵⁸

SERAC v FRN (n 53) [51].

It is submitted, in the light of the above case (SERAC v FRN) that governments who are parties to human rights instruments, such as the African Charter, must fulfil certain minimum duties which are internationally accepted. These duties were classified in four categories, namely: the duty to respect, protect, promote and fulfil the rights as it relates to a safe environment.⁵⁹ The commission has directly expressed the fact that *the right to life could be interpreted to include environmental rights*, and that such right has a higher priority over others. This was emphasised by the Commission when it stated that ‘Given the widespread violations perpetrated by the government of Nigeria and private actors, the most fundamental of all human rights, the right to life has been violated.’⁶⁰ This position, undeniably affirms the global perception that the right to life cannot be satisfactorily protected in a degraded environment, particularly in environment enmeshed with dangerous activities of oil and gas by TNCs. From a wide range of literature review and international judicial pronouncements, a strong link does exist between environmental pollution and fundamental rights violation; in essence, this remains a sacred fact and substantially undisputed.

The above case seems to be devoid of any technical challenges in establishing liability due to the apparent admittance of the Nigerian government on the gravamen of the complaints. Albeit the African Charter which was relied upon in the communication has no qualifications or exceptions on the rights to life and that of a safe environment, there could be circumstances where the respondent would show that it has taken adequate steps to avert the alleged damages caused to the environment, thereby exonerating itself from liability. Literally, and in strict application of the aforementioned Charter rights, the defence of taking adequate or reasonable steps to avert any environmental damage as a result of oil and gas activities ought not to stand or be sustained. This position is particularly anchored on the absolute nature of Article 24 of the African Charter which guarantees a right to a satisfactory environment without exceptions. Conversely, Article 4 of the African Charter, which was one of the provisions under which liability was pronounced on the Nigerian government, is to the effect that the right to respect for life and integrity of human beings may not be ‘arbitrarily’ deprived. The choice of the word ‘arbitrarily’ which denotes carrying out actions ‘on the basis of random choice or personal whim, rather than any reason or system’ suggests that

⁵⁹

ibid [44].

⁶⁰

ibid [67].

polluters may escape liability once it is shown that the cause of pollution was not intentional or that the pollution emanates despite deployment of reasonable steps; thereby indicating that the cause (s) of pollution was not arbitrarily inflicted on inhabitants.

It was shown in the *SERAC* case that the Nigerian government neglected all precautionary measures to avert damage caused in Ogoni land, and the only precautionary measures were belated.⁶¹ The African Commission was explicit on the measure of liability obtainable from the provision on the right to healthy environment when it observed that:

The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecological sustainable development and use of natural resources.⁶²

With regard to the need for states to take ‘reasonable measures’⁶³ to avert pollution, it would be plausible to state that such requirement falls within the parameters of the law of nuisance and negligence. The Commission reasoned further that:

...The government of Nigeria, through the NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. However, the care that should have been taken...and which would have protected the rights of the victims of the violations complained was not taken.⁶⁴

In the light of the foregoing, it would not be out of place to say that the African Commission predicated its measure of liability in environmental pollution cases on common law principles of nuisance and negligence (on duty of care).

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SERAC v FRN (n 53) [69].

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SERAC v FRN (n 53) [52].

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See figures 1.4.1, 1.4.2 and 1.4.3 in chapter 1 for the meaning of ‘reasonability and due care’.

⁶⁴

SERAC v FRN (n 53) [54].

There is no gainsaying that human rights provisions on environmental protection is an emerging area of the Nigerian legal system.⁶⁵ However, it is maintained that the right to a healthy environment ought to be part of customary law owing to its significance. In the ground-breaking case of *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd and others*,⁶⁶ the applicants brought a claim for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33 and 34 of the 1999 Constitution of the Federal Republic of Nigeria (as amended), and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.⁶⁷ The application was brought by the plaintiffs in respect of the continuous flaring of gas by the respondents (SPDC and others). Section 33(1) of the Constitution⁶⁸ states that, 'Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.'

On the other hand, section 34(1)(a)⁶⁹ of the Constitution provides that 'Every individual is entitled to respect for dignity of his person, and accordingly no person shall be subject to torture or to inhuman or degrading treatment.' The applicants claimed in their motion on notice the following reliefs: (1) A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Nigerian Constitution, and reinforced by articles 4, 16 and 24 of the Charter, inevitably includes the right to clean poison-free environment, pollution-free and healthy environment; (2) A declaration that the actions of the 1st and 2nd respondents (SPDC and NNPC)

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See figure 2.5 on awareness of human rights as a tool for environmental protection in Nigeria.

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[2005] AHRLR 151 (Federal High Court of Nigeria, Benin judicial division).

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African Charter (n 45).

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Nigerian Constitution (n 38), s 33 (1).

⁶⁹

ibid, s 34(1) (a).

respectively in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person as contained in the Nigerian Constitution and the Charter respectively among others.

The applicants alleged that no environmental impact assessment was carried out by the 1st and 2nd respondents concerning their gas flaring activities in Iwherekan Community as required by the Environmental Impact Assessment Act,⁷⁰ and as a result this has led to the 'unrestrained, mindless flaring of gas' by the 1st and 2nd respondents. The applicants equally averred that no valid ministerial gas flaring certificates were obtained by any of the 1st and 2nd respondents which could authorise them in gas flaring as required by the Associated Gas Re-Injection Act.⁷¹

The court, granting the applicant's application declared that the provisions of section 33(1) and 34(1)(a) of the Constitution are guaranteed rights and they inevitably include the rights to 'clean poison-free, pollution-free healthy environment.'⁷² The court further held that the actions of the Respondents in the continuous flaring of gas in the course of their oil exploration and production activities in the community of the Applicants is a gross violation of their fundamental right to life (which according to the court includes a healthy environment) and dignity of human person as provided in sections 33(1) and 34(1) of the Nigerian Constitution⁷³ which are clearly stated above.

The Federal High Court went further to hold that gas flaring in the instant case was inconsistent with the applicant's rights to life and/or dignity of human person enshrined Articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and

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Environmental Impact Assessment Act Cap E12 LFN 2004, s 2(2).

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Associated Gas Re-Injection Act Cap A25 LFN 2004, s 3(2).

⁷²

Jonah Gbemre (n 66) 155.

⁷³

ibid.

Enforcement) Act.⁷⁴ A combined reading of Articles 4 and 16 of the Charter provides for the individual's rights to life and integrity as well as the right to enjoy the best attainable state of physical and mental health, and the former rights (in Article 4) are virtually the same with the provisions in sections 33(1) and 34(1) of the Nigerian Constitution, while Article 24 of the Charter provides for the right to a satisfactory environment.

Nevertheless, a close observation of section 6(6)(c) of the Nigerian Constitution which renders section 20 unenforceable appears to be in contradiction with the enforcement and interpretation of sections 33 and 34 of the same Constitution by the Federal High Court in the *Gbemre* case to include environmental rights. It is mentioned earlier that section 20 sets a positive obligation on the Nigerian State to protect and improve the environment, and this obligation falls within 'Chapter II' of the Nigerian Constitution, which is rendered non-justiciable by virtue of section 6.⁷⁵ Sections 33 and 34 of the Constitution could be found under Chapter IV which is entitled, 'Fundamental Rights'. This perceived contradiction is informed on the fact that from the provisions of section 6(6)(c) (the constitutional provision limiting powers of the court to entertain matters arising from the Fundamental Objectives and Directive Principles of State Policy), it could be reasoned that the framers of the Nigerian Constitution never intended government breaches of 'environmental rights' to be enforceable in the Courts of law. But in what appears to resolving the perceived contradictions between section 20 of the Nigerian Constitution (government's duty to protect the environment, which is non-justiciable) and the interpretation of sections 33 and 34 to include environmental rights, the Court of Appeal (Justice Mamman Nasir) in the case of *Bishop Okogie (Trustee of Roman Catholic schools) & Ors v Attorney-General of Lagos State*⁷⁶ stated, that: '...no provision in Chapter II can override or inhibit the provisions of Chapter IV on fundamental rights.' This position of the Court of Appeal is to affirm the sacrosanct nature of the fundamental rights as contained in the Nigerian Constitution, particularly sections 33 and 34 as it relates to a healthy environment. This is also in line with the Indian doctrine of

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African Charter (n 45), art 4, 16 and 24.

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Section 6 (6) (c) of the Nigerian Constitution (n 38) bars any court of law from entertaining legal issues emanating from the provision of Chapter II of the Constitution.

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[1981] 2 NCLR 337 (CA) at 350 and 351.

‘Harmonious Construction’ which seeks to create a balance between the non-justiciable provisions of the Constitution on one hand and the fundamental rights of individuals on the other.⁷⁷

Surprisingly, the applicants in the *Jonah Gbemre* case did not argue on the violation of the right to private and family life under section 37 of the Nigerian Constitution in view of the fact that the gas flaring incident could have possibly affected the quality of private lives and the enjoyment of their homes as can be seen in majority of the cases decided by the European Court of Human Rights, which are mentioned in chapter 2 of this research. A ruling by the Federal High Court on this fundamental right would have been useful for legal and academic analysis as it is the case on the other rights analysed herein.

Having regard to the aforementioned provisions and the outcome of the *Johna Gbemre*’s case, there is the tendency to conclude that the liability of oil Transnational Corporations under the Constitution of the Federal Republic of Nigeria is ‘absolute’. But such conclusion may not be too healthy; although neither the Constitution nor the Charter made provisions as to the requirements for establishing the liability of violators of the aforementioned fundamental rights, it is obvious that once such rights are infringed, the victim only need to prove that it was the injurer that is responsible for such breach or likely to infringe the said rights. It is submitted that the requirement of ‘foreseeability of harm’ as required in strict liability cases may not be relevant in establishing the liability of the Respondents (polluters) since these provisions are based on the fundamental rights of the individual. A pertinent question would be whether environmental damage is foreseeable? It is well known that activities of oil and gas TNCs are such that are ‘likely to cause mischief’, and in view this, oil and gas pollution are foreseeable damages. Considering the case of *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*,⁷⁸ and the discussion in figure 1.7 in chapter 1, it is trite that the Nigerian Courts have taken judicial notice of the fact that environmental pollution caused by activities of TNCs are foreseeable acts, but the major shortcomings are traceable to the numerous defences raised by TNCs, and most common is the defence of

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See discussion under figure 6.6 in (n 171).

⁷⁸

[1973] MWSJ 61 (Ovie Whiskey J).

statutory authority and act of a third party as shown in *Anthony Atubin & Ors v Shell Petroleum Development Company Nigeria Ltd.*⁷⁹

However, the requirement of ‘escape’ (as in *Rylands v Fletcher*) as applicable in the strict liability doctrine will be a necessary element in a case of fundamental rights enforcement since there cannot be said to be a breach of fundamental right of any victim as regards oil and gas pollution where there is no oil leakage or gas flaring. In essence, there ought to be a disaster (or likelihood of a disaster) caused by oil spillage or gas flaring which must have threatened or violated the life of the victim (physical or mental health), or caused damage to his integrity, or make his environment unsatisfactory as required by both sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria⁸⁰, and Article 4, 16, and 24 of the African Charter respectively.⁸¹

Relevant principles on human rights based arguments in environmental protection were emphasised in the case of *Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria*.⁸² In that case, the plaintiff, via *actio popularis* in July 2009 filed a complaint to the ECOWAS Court of justice⁸³ against the Nigerian government, NNPC and six other oil firms. The plaintiffs relied on Articles 16 and 24 of the Charter which borders on the right to enjoy physical and mental health, and the right to a safe environment respectively. The plaintiffs submitted that the government of Nigeria has failed to promote conditions in

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Unreported Suit no UCH/43/73 of 21/11/1974 (High Court of Ughelli Nigeria). See also *The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC) [93] on the defence of ‘act of third parties’.

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Nigeria Constitution (n 38). See sections 33 (1) and 34 (1).

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African Charter (n 45), articles 4, 16 and 24.

82

[2012] Community Court of Justice, ECOWAS (Judgment N0 ECW/CCJ/JUD/18/12).

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The Community Court of Justice, ECOWAS has jurisdiction to determine cases of human rights violations that occur in any Member State and its decisions are binding, and each Member State shall indicate the competent national authority responsible for the enforcement of decisions of the Court. See Article 15 of the ECOWAS Revised Treaty 1993 and Article 24 of the 2015 Protocol for establishment of the Court and enforcement of Judgments respectively.

which people can lead a healthy life due to its failure to prevent widespread pollution as a result of the activities of oil and gas industries in the Niger Delta area.⁸⁴ It was further alleged by the plaintiffs that the Nigerian government failed to put in place ‘modalities and logistics,’ as well as appropriate laws that will regulate activities of foreign companies operating in the Niger Delta in order to avoid human rights violations.⁸⁵

The plaintiffs, in the above case further submitted that by failing to deal with corporate actions that harm human rights and the environment, the Nigerian government has not only compounded the challenges of human rights abuse but has equally aided and abetted the oil and gas companies in the Niger Delta in violations of the human rights as contained in the African Charter.⁸⁶ Whilst outlining the basic issues for determination, the ECOWAS Court of justice stated that:

...The heart of the dispute is to determine whether in the circumstances referred to, the attitude of the Federal Republic of Nigeria, as a party to the African Charter on Human and Peoples’ Rights, is in conformity with the obligations subscribed to in terms of Article 24 of the said instrument...⁸⁷

In response to the above issue, the ECOWAS Court of justice noted that if a state is taking all the necessary legislative, administrative and other measures, it must ensure that ‘vigilance and diligence’ are employed and observed towards attaining concrete results.⁸⁸ The Court further maintained that despite all the laws and agencies in existence, the Nigerian government could not show from the pleadings a single action that has been taken in recent years to ‘seriously and diligently’ hold any of the perpetrators of environmental pollution in

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ibid [67].

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ibid [71].

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SERAP v FRN (n 82) [72].

87

SERAP v FRN (n 82) [98].

88

SERAP v FRN (n 82) [101].

the Niger Delta,⁸⁹ and that it is this omission to act, to prevent damage and to hold accountable, environmental polluters that has characterised the violations of the Charter rights.⁹⁰ Albeit the Nigerian government denied responsibility when it alleged that it is the duty of a license holder to take all reasonable steps to avoid damage and pay compensation to victims of oil spill,⁹¹ the Court found the Nigerian government to have violated the aforesaid Articles in the Charter as a result of the ‘continuous and unceasing damage’⁹² caused to the environment. The Court further affirmed that the Nigerian government defaulted in its duties in terms of ‘vigilance and diligence’⁹³ as a party to the Charter.

A significant concept for determining liability, which can be drawn from the above case (*SERAP v FRN*) is that of ‘vigilance and diligence’. In essence, an applicant in a fundamental rights based argument in environmental pollution as shown above must establish that the respondent was not diligent and vigilant regarding their duties as enshrined in the Charter. Another similar and significant aspect of both judgments in *Johna Gbemre*⁹⁴ and the latter case of *SERAP v Nigeria*⁹⁵ is the emphasis given to the fact that the alleged pollution was ‘continuous and unceasing’. In *Johna Gbemre*’s case the Federal High Court held that the ‘continuous’ flaring of gas by SPDC in the course of their oil activities is a gross violation to the aforesaid rights in the Constitution and Charter.⁹⁶ In the latter case of *SERAP v Nigeria*,

89

ibid [110].

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ibid [111].

91

ibid [82].

92

ibid [112].

93

ibid.

94

Jonah Gbemre (n 66).

95

SERAP v Nigeria (n 82).

96

the Court found the Nigerian government to have violated the aforesaid Articles in the Charter as a result of the ‘continuous and unceasing damage’ caused to the environment.⁹⁷ The question to pose is: would the respondents be exonerated in human rights based arguments for environmental pollution if the alleged damage is temporary? Or would the Nigerian government be said to have been diligent and vigilant if the alleged pollution is temporary? This question can both be answered in the affirmative and in the negative. From the judgment of the earlier case of *SERAC v Nigeria*,⁹⁸ the African Commission held the Nigerian government liable due to the absolute admittance of the complainants’ claims on the violation of the Charter rights, although the government was said to have put in place certain remedial measures, such measures seem belated; that is, after the alleged rights have been violated. It follows that the primary factor for liability in fundamental rights violations as it relates to environmental pollution is the fact that the applicants have suffered damages, irrespective of whether the alleged pollution is continuous or temporary. But this latter submission could be debunked and discountenance with, having regard to the recent case of *SERAP v Nigeria*⁹⁹ as decided by the ECOWAS Court of Justice. The ECOWAS Court of justice seem to be more concerned about the seriousness of the Nigerian government in tackling issues of environmental pollution generally in awarding liability, rather than the continuity, or length of time which a single pollution incident might have lasted. This could be seen when the court stated that:

It is significant to note that despite all the laws it has adopted and all the agencies it has created, the Federal Republic of Nigeria was not able to point out in its pleadings a single action that has been taken in recent years to seriously and diligently hold accountable any of the perpetrators of the many acts of environmental degradation which occurred in the Niger Delta Region.¹⁰⁰

Jonah Gbemre (n 66).

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SERAP v Nigeria (n 82) [112].

⁹⁸

SERAC (n 53).

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SERAP (n 82).

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SERAP v Nigeria (n 82) para 110.

From the foregoing, it could be submitted that environmental polluters are likely to be exonerated from liability if it could be shown through evidence any ‘seriousness and diligence’ in past records, despite the occurrence of a continuous pollution in a single case which may form the subject of the rights enforcement. But again, one could object why a government or oil operator who has been consistent in ‘diligence and vigilance’ as regards a pollution-free environment would allow a particular pollution activity to be continuous. In all circumstances, the applicant must show damage or the likelihood of any damage to be caused in order to institute and succeed a claim in human rights based arguments. This latter submission is buttressed in the light of the provision of the Fundamental Rights Enforcement Procedure Rules that any person who alleges that any of the rights in the Nigerian Constitution or Charter which he is entitled to has been, is being, or is likely to be infringed may apply to a competent court for redress.¹⁰¹ It is hereby settled that an applicant may institute an action where there is a likelihood or an impending threat to the violations of the Constitutional and Charter rights, and liability does not necessarily has to be based on a ‘continuous and unceasing damage’. But in this instance, the Court could only grant an injunction to restrain the respondent(s) from infringing on the Fundamental rights of the applicant. Compensation and or damages could not be awarded since no harm has been suffered.

6.4.1 The Technical Meaning of the Term ‘Absolute’ and its Usage within the Framework of Fundamental Rights Violations

Attempts have already been made to explain the term ‘absolute liability’.¹⁰² But within the context of modern legal usage of the term, there seem to be disparities in its application; in some instances, the doctrine of strict liability is used as a synonym for absolute liability. For instance, in the dictionary of law by Curzon, ‘strict liability in criminal law’ was used to denote ‘absolute liability’.¹⁰³ In this context, an offender is held criminally responsible for particular offences, whether he has any *mens rea* or not. To this extent, there would be little

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FREP Rules 2009, Ord II, r 1.

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See figures 1.7 in chapter 1, and figures 6.2 and 6.3 on attempts to explain the concept of absolute liability.

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Leslie B Curzon, *Dictionary of Law* (6th edn Pearson Education Essex 2002) 2.

inconvenience in using the terms ‘absolute liability’ and ‘strict liability’ interchangeably; in the English case of *Whitehouse v Gays News*,¹⁰⁴ the House of Lords held that guilt of the offence of the criminal offence of blasphemous libel did not depend on the accused having intent to blaspheme. Lord Viscount was categorical in this regard when he observed:

What I regard as of great significance is that in none of what I regard as the leading cases on the publication of a blasphemous libel is there to be found any direction to the telling that it had to be proved that the defendant intended to blaspheme, and I have not found in any decided case any criticism of the omission to do so.¹⁰⁵

But even where *mens rea* is irrelevant in holding an accused responsible, other general defences in criminal liability could still prevail, or even the same statute could provide some criminal defences. For example, there is the Harmful Waste (Special Criminal Provisions) Act,¹⁰⁶ particularly section 6 of the Act which imposes criminal liability on polluters of the environment ranging from carrying and dumping of harmful waste in the air, land or waters of Nigeria save with the consent of a lawful authority.¹⁰⁷ It follows that, permission can be taken from the proper authorities to pollute the environment. Black’s Law Dictionary is not too helpful in unveiling the legal meaning of absolute liability; there are only cross references between ‘absolute liability’, ‘strict liability’ and ‘liability’ with a definition of liability. But the Black’s has defined ‘Absolute’ to mean ‘free from restriction, qualification, or condition’.¹⁰⁸

Garner, in ‘A dictionary of modern legal usage’ used the phrases ‘strict liability, absolute liability, and liability without fault’ to mean ‘liability that does not depend upon actual negligence or intent to harm’, suggesting that strict liability is the most common term in both

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[1979] AC 617.

¹⁰⁵

Whitehouse v Gays News (n 142) 642.

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Cap H1 LFN 2004.

¹⁰⁷

ibid, section 1(2).

¹⁰⁸

Bryan A Garner (ed), *Black’s Law Dictionary* (8th edn, Thomson West 2004) 7.

American English and British English, whilst equally admitting that some writers do distinguish between strict and absolute.¹⁰⁹ Having considered the doctrine of strict liability under *Rylands v Fletcher* in chapter 1 of this research, it is common knowledge that the doctrine of strict liability, despite being a principle that is perceived not to require the proof of fault to establish the liability of the defendant, there are a handful of remarkable defences which the defendant can raise to escape liability. In this vein, Rogers, whilst observing the non-absolute nature of the doctrine of strict liability had said that, ‘Liability under the rule is strict in the sense that it relieves the claimant of the burden of showing fault; however, it is far from absolute since there are a number of wide-ranging defences.’¹¹⁰

The above remark brings one closer to the concept of absolute liability as being applied to fundamental rights enforcement. It clearly depicts a sort of liability as seen in the *Rylands v Fletcher* case, but this time, without any defences. The Osborn’s Concise Law Dictionary had defined the term ‘absolute’ to mean ‘complete and unconditional’.¹¹¹ In the same vein, Stewart and Burgess have defined ‘absolute liability’ as:

A phrase to describe a case where liability attaches to a person on the happening of given condition and despite any care that person may have taken and despite any facts suggesting the happening was outwith human foresight.¹¹²

The above definition clearly indicates liability imposed on a defendant; which is devoid of the requirements of due care (required in negligence) as well as reasonable foreseeability (required in both nuisance and strict liability) on its part. This, without any ambiguity isolates and differentiates the concept of absolute liability from the aforementioned common law doctrines. The Oxford Dictionary of Law is even closer to the description of the absolute liability concept within the ambit of environmental rights. It defined ‘absolute right’ as:

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Bryan A Garner, *A Dictionary of Modern Legal Usage* (2nd edn OUP 1995) 10 and 836.

110

WVH Rogers, *Winfield & Jolowicz Tort* (18th edn, Sweet and Maxwell 2010) 763.

111

Woodley Mick (ed), *Osborn’s Concise Law Dictionary* (10th edn, Sweet & Maxwell 2005) 4.

112

William J Stewart and Robert Burgess, *Collins Dictionary of Law* (HarperCollins Glasgow 1996) 3.

A right set out in the European Convention on Human Rights that cannot be interfered with lawfully, no matter how important the public interest in doing so might be. Absolute rights include freedom of thought, conscience, and religion and the prohibitions on torture, inhuman treatment or punishment, and degrading treatment or punishment.¹¹³

The aforesaid definition was compared with ‘qualified right’, which denotes a right that can be interfered with on proportionate legitimate aim,¹¹⁴ and the term ‘proportionality’ is said to be applicable within the context of the European Convention on Human Rights where the expression ‘necessary in a democratic society’ is contained in the Article.¹¹⁵ Although, there is logical classification between ‘absolute rights’ and ‘qualified rights’ as seen above, there seem not to be any remarkable difference amongst the Convention rights in terms of the proportionality of interference on the part of government. Despite the importance placed on the Convention rights, it has been shown through case law, both at regional (European Court of Human Right) and domestic application (in *Marcic v Thames Water Utilities Ltd*)¹¹⁶ in the UK that such rights, based on the doctrine of the Margin of Appreciation can be interfered with, when it is shown that government has taken reasonable steps to protect the interest of the individual.

In the light of the above, and in light of the meaning ascribed to the concept of ‘Absolute liability’, the most common being ‘complete and unconditional’, it is submitted that the Convention rights are far from being absolute. In fact, the definition of ‘absolute right’ in the Oxford Dictionary of law suggesting some Convention Rights cannot be interfered with, ‘no matter how important the public interest in doing so might be’ could in effect, be considered misleading. In practical terms, all such rights are ‘qualified’ in view of the doctrine of the *Margin of Appreciation*. This latter stance is more particularly hinged on the provision of section 1(2) of the Human Rights Act (in UK) to the effect that the Conventions rights (including subsequent protocols) are to have effect for the purposes of the Act subject to any

¹¹³

Elizabeth A Martin (ed), *Oxford Dictionary of Law* (5th edn, OUP 2003) 3.

¹¹⁴

ibid 400.

¹¹⁵

Oxford Dictionary of Law (n 113) 389 on the meaning of proportionality.

¹¹⁶

[2004] 1 All ER 135 (HL).

designated derogation or reservation.¹¹⁷ Davis distinguished between ‘absolute rights’ and ‘qualified or restricted rights’ under the Convention Rights. The former, according to Davis secure some freedoms by imposing duties on states that must be performed in all circumstances, like the right not to be tortured in Article 3.¹¹⁸ In the latter, like Article 8 right (right to private life), it is clear that there are instances where the law can be legitimately utilised to restrict the exercised of such right.¹¹⁹

An argument for absolute liability is not vindictive, and not necessarily geared towards punishing or penalising TNCs, but a call to spur a high sense of responsibility irrespective of the amount of compensation that would follow after being declared absolutely liable for spills. It follows that, governments may choose to enact laws to cut down the costs of compensations to be paid by TNCs, but it is only logical under the current research that where activities of oil and gas interfere with fundamental rights of inhabitants, there should be no excuse whatsoever.

From the foregoing, it is imperative to ask: will the polluter be liable for breach of environmental rights where pollution incidents are traceable to acts of sabotage from third parties? It is worthy of note that the Federal High Court in *Jonah Gbemre* did not grapple with the aforementioned issue. However, in *FA Akpan & Anor v Royal Dutch Shell & Anor*,¹²⁰ the second plaintiff (Melieudefensie) moved for a declaratory judgment whilst making reference to the *Jonah Gbemre* case in a Dutch Court, that SPDC is liable for affecting Akpan’s (first plaintiff) right to physical integrity due to the contamination of his environment. The District Court of The Hague, in dismissing the request, reasoned inter alia, that in *Gbemre*, the Court ruled that SPDC had infringed a human right by its ‘active conduct’ by deliberately flaring gas during a long period. Meanwhile in *Akpan* (case at issue),

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¹¹⁸ Human Rights Act 1998, s 1(2).

¹¹⁹ Howard Davis, *Human Rights Law* (3rd edn OUP 2013) 27.

¹²⁰

ibid.

¹²⁰

District Court of The Hague Case No. C/09/337050/HA ZA 09-1580, 30 January 2013<<https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-shell-oil-spill-ikot-ada-udo>> accessed 12 January 2016.

SPDC cannot be blamed for any active conduct except negligence; noting that there have been no Nigerian ruling in which event of sabotage by third parties is considered to be an infringement of a human right.¹²¹ The position of the District Court of Hague deserves support. Notwithstanding, the current argument for an absolute liability is anchored on the fundamental nature of the rights captured in Chapter IV of the Nigerian Constitution, and in this regard, it is maintained that government owes a duty to preserve the aforesaid rights, and this entails securing oil and gas facilities in order not to violate rights of law-abiding citizens.

From the analysis in figure 6.4 above, there is much to be argued within the Nigerian jurisdiction, that if law is to be followed within the strict sense of legal positivism, then one would be left with no other option than submitting that liability in environmental rights are absolute. To reiterate on the most relevant constitutional and statutory provisions on the right to a clean environment would be useful on this proposition. For sections 33 and 34 which borders on the rights to life and dignity of human person respectively, have no known exceptions or qualification under which a respondent in an action for fundamental rights enforcement relating to environmental pollution would rely on to escape liability.

For the sake of clarity, the constitutional defences for the right to life are execution of the sentence of a court, defence of person from unlawful violence or property, to effect lawful arrest or prevent escape of detained persons, suppressing in riot, insurrection or mutiny. The aforesaid are the only defences known in the Nigerian Constitution regarding the right to life.¹²² In the same vein the only grounds under which the right to dignity of the person (inhuman or degrading treatment) can be interfered with are events of forced labour in consequence of the sentence or order of a court, labour required of members of the armed forces, any labour reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community, compulsory national service which forms part of the education and training of citizens as may be prescribed by an Act of the National Assembly.¹²³

¹²¹

ibid 4.56.

¹²²

Nigerian Constitution (n 38), section 33(1) and (2)(a), (b) and (c).

¹²³

Nigerian Constitution (n 38), section 34(1) (a)(b)(c) and (2) (a)(b)(c)(d)(e).

Again, virtually all of the decided cases by the European Court of Human Rights discussed in chapter 2 of the research were fully or partially premised on the violation of applicants' rights to respect for private and family life, home and correspondence,¹²⁴ which is provided for in Article 8(1) of the Convention rights, and in Nigeria, similar provision is found in section 37 of the Nigerian Constitution (Right to private and family life) and the same exceptions applicable to Article 8(1) as seen in Article 8(2) of the Convention rights (such right can be interfered with where necessary in the interest of national security, public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others and for the interest of the economic well-being of the state) are equally found and applicable to the right to private and family life as seen in section 45(1) (a) and (b) of the Nigerian Constitution, except the defence relating to the 'economic well-being of the state' which is clearly missing in the Nigerian Constitution. This ordinarily presupposes that the individual's right to private and family life in Nigeria could not be interfered with on the basis of economic activities or benefits of the State.

Although, the right to respect for private and family life was not argued in the Nigerian case of *Jonah Gbemre v SPDC*, it is submitted that looking at the arguments of the applicants in the cases decided by the European Court of Human Rights (arguments ranging from effect of toxic emission, smells, noise and polluting fumes from industrial plant) for interference with the right to private and family life, there is no gainsaying that oil and gas pollutions replete in the Niger Delta region of Nigeria would amount to violation of the right to private and family lives of inhabitants as provided for in section 37 of the Nigerian Constitution. To understand vividly the conditions under which the right to private and family life can be restricted or derogated from in Nigeria, the provision of section 45(1)(a) and (b) would be necessary. It provides that:

Nothing in sections 37, 38,...of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-(a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedoms of other persons.¹²⁵

¹²⁴

See the cases of *Guerra v Italy*, *Powell and Rayner v UK*, *Lopez Ostra v Spain*, and *Hatton and others v UK* as discussed in figure 2.3.

¹²⁵

Nigerian Constitution (n 38).

Looking at the above provision (section 45 of the Nigerian Constitution), it is plausible to hold that oil and gas activities do not amount to, or correspond with any of the defences mentioned therein. The constitutional mandate of the right to respect for private and family life would have been substantially weakened within the ambit of fundamental rights proceedings relating to oil and gas pollution if the ‘interest of economic well-being of the state’ is included in section 45(1)(a) and (b) above. This is because, oil and gas activities of oil TNCs, as mentioned, are economically beneficial to the state, and in view of this development, it is submitted that a victim of oil and gas pollution approaching the Court with an argument for breach of the right to private and family life in Nigeria, can be assured of a stricter liability than the existing common law and statutory liability principles applicable in Nigeria, and technically speaking, liability can be considered absolute in this regard.

Article 24 of the African Charter was even more absolute without any reservation when it provides that ‘All peoples shall have the right to a general satisfactory environment favourable to their development’.¹²⁶ In the light of the foregoing, it would be probable in law to state that where the Constitution or statute is silent as to any defence or exception, the presumption that such a defence is required would be rebutted. Conversely, in *FA Akpan & Anor v Royal Dutch Shell & Anor*,¹²⁷ as mentioned earlier, The District Court of The Hague reasoned that SPDC cannot be blamed for any active conduct in breach of fundamental environmental rights except negligence; noting that there have been no Nigerian ruling in which event of sabotage by third parties is considered to be an infringement of a human right.¹²⁸

It is argued that it would be incompatible with provisions of the Constitution and even of the African Charter (which is given higher priority) for environmental polluters to raise any of the defences in the common law torts of negligence, nuisance or strict liability as mentioned earlier in fundamental rights enforcement proceedings; for in strict compliance with legal positivism, those defences are not known to the Nigerian Constitution, and it could be argued

¹²⁶

African Charter (n 45).

¹²⁷

Akpan (n 120).

¹²⁸

ibid 4.56.

that bearing in mind the supremacy of the Nigerian Constitution, all defences of act of a third party, exercise of due care and reasonability and statutory authority as found in the Oil Pipelines Act, Associated Gas Re-Injection Act and the Petroleum Act as mentioned in chapter 5 of this research, are to the extent of their inconsistency void.¹²⁹

In view of the above, it is submitted that owing to the importance attached to fundamental rights to a healthy environment argued in this research, it is wise for the Courts to improve and tighten the measure of liability (beyond that of nuisance, negligence and under the strict liability rule) in favour of victims of oil and gas pollution incidents in environmental rights enforcement as seen in the *Jonah Gbemre* case due to the importance of environmental protection and the need for TNCs to exhibit seriousness in handling their activities vis-à-vis the environment.

6.4.2 The Legal Duty of Vigilance and Diligence

In the case of *Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria*¹³⁰ mentioned above, the ECOWAS Court of justice laid much emphasis on the requirement of ‘vigilance and diligence’ on the part of government to avoid liability in cases of environmental right violations. The Court was more specific when it observed that it is this omission to act, to prevent damage and to hold accountable, environmental polluters that has characterised the violations of the Charter rights.¹³¹ Whilst the term ‘diligence’ can easily be linked to the requirement of due care in the common law principle of negligence, ‘vigilance’ appears to be vague and hollow in legal usage. A reference to the Black’s Law Dictionary defines vigilance as:

Watchfulness; precaution; a proper degree of activity and promptness in pursuing one’s rights, in guarding them from infraction, and in discovering opportunities for enforcing one’s lawful claims and demands.¹³²

¹²⁹

See section 1(1) and (2) on the Supremacy of the Nigerian Constitution.

¹³⁰

ECOWAS Court Judgment (n 82).

¹³¹

ECOWAS Court Judgment (n 82) [111].

¹³²

Black’s Law Dictionary (n 108) 1599.

Hence, to be vigilant is to be ‘watchful and cautious’, to be ‘on the alert’ and to be ‘attentive to discover and avoid danger’.¹³³ Whilst diligence has been defined as ‘care: caution; the attention and care required from a person in a given situation’.¹³⁴ In view of the above, it follows that both vigilance and diligence, require ‘caution’ and ‘watchfulness’, it would be legally convenient to say both terms are synonymous. Could it be probable to say that liability for oil and gas pollution at the regional level (in West Africa and Africa as a whole) is hinged on the common law principle of negligence and not absolute liability? In the case of *Social and Economic Rights Action Centre (SERAC) and Another v The Federal Republic of Nigeria*,¹³⁵ it was emphasised by the African Commission that the right to a healthy environment imposes obligation upon a government to take reasonable and other measures to prevent pollution,¹³⁶ and the care needed to protect the rights of the victims was not taken.¹³⁷ It is noted that the duty of ‘prevention’ is said to have originated from the requirement of ‘due diligence’,¹³⁸ and the duty of care, prevention and due diligence are all elements of the tort of negligence. The case of *Donoghue v Stevenson* is always useful whenever the law of negligence is mentioned. For the sake of emphasis reference would be made again. Lord Atkin in the case of *Donoghue v Stevenson*,¹³⁹ observed that:

...You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who

¹³³

ibid.

¹³⁴

ibid 488.

¹³⁵

SERAC (n 53).

¹³⁶

SERAC (n 47) [52].

¹³⁷

ibid [54].

¹³⁸

See *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep14, para 101.

¹³⁹

[1932] AC 562 (HL).

then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question...¹⁴⁰

To what extent is the *Donoghue* case still relevant? It is submitted that the above *obiter dictum* from Lord Atkin covers legal requirements in the torts of negligence, nuisance and under the strict liability rule. The reason being that it raises the need to exercise due care (in negligence), to be reasonable (in nuisance) and the element of reasonable foreseeability (in strict liability, nuisance and negligence) which are adequately discussed in chapter 1. Ordinarily, under common law, once damage is foreseeable, as can be seen in the *Rylands* case, liability is considered strict, and there is no further consideration whether the defendant exercised due care or not.¹⁴¹ In another hand, it has been shown in Nigerian domestic law that proof of lack of ‘due care’ is necessary to establish liability against TNCs in Nigeria, even where damage is foreseeable.¹⁴²

Considering the relevance of the concept of vigilance, it is submitted that it is a clear effort to sustain the duty imposed by law with regard to the need to exercise due care in upholding environmental rights promoted by the African Charter. For instance, the deployment of security agents in securing oil pipelines and installations would obviously amount to an act of vigilance. Notwithstanding, there may not be any harm in using the terms diligence and vigilance interchangeably since it is obvious that both terms are geared towards protecting and preventing foreseeable harm on the citizenry and to abhor a state of recklessness.

It is worth asking whether one can be diligent without being vigilant. The crux is that both terms stand to achieve the same goal of environmental protection, as diligence would entail vigilance. Nevertheless, a better connotation can only be given by the court after due consideration of available evidence on measures taken by polluters and the prevailing circumstances. Whilst there are limited exceptions in the African Charter under which environmental rights can be violated as shown in the discussion under figure 6.4, the Courts

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ibid 580.

¹⁴¹

See figure 1.3 for the nature and scope of the strict liability rule.

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See figure 5.4 on responsibility for oil and gas pollution incidents in Nigeria.

are mindful of the dangers involved in toeing the line of imposing an absolute liability regardless of measures taken by government and TNCs to avert environmental degradation, particularly bearing in mind the economic importance of crude oil and gas trade to the nation's economy.

The justification for exonerating a polluter which has shown vigilance as emphasised in the *SERAP* case¹⁴³ can be linked to the legal maxim '*vigilantibus non dormientibus jura subveniunt*,' which is to the effect that the laws help those who are watchful, not those who sleep.¹⁴⁴ In view of this, it may sound unjustifiable to punish polluters who have taken all necessary measures to prevent violation of environmental rights in the African Charter and Nigerian Constitution.

6.5 Transformation of Negligence, Nuisance and Strict Liability to Absolute Liability

It is settled that both the ECOWAS Court of justice in *SERAP v Federal Republic of Nigeria* and the African Commission in *SERAC v The Federal Republic of Nigeria* are inclined toward the principles applicable in the tort of negligence in resolving environmental rights violation proceedings. Do we now suppose that the same measure of liability is applicable in municipal law in Nigeria? In the case of *Hatton and others v United Kingdom*,¹⁴⁵ the Grand Chamber of the European Court of Human Rights had observed that the role of the European Convention on Human Rights was essentially a subsidiary one, and that national authorities had direct democratic legitimation, and were, in principle, better placed than an international Court to evaluate local needs and conditions. In the same vein, despite the relevance of the judgments of the ECOWAS Court of Justice as well as the African Commission, it is certain that the Nigerian Courts are better placed to evaluate local needs and conditions. However, it is expedient to note that the Community Court of Justice, ECOWAS has jurisdiction to determine cases of human rights violations that occur in any Member State and its decisions

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SERAP (n 82).

¹⁴⁴

LB Curzon, *Dictionary of Law* (n 103) 444.

¹⁴⁵

[2003] 37 EHRR 611, [2003] All ER (D) 122.

are binding.¹⁴⁶ Victims of environmental pollution, therefore, are entitled to approach the court in alleged fundamental rights violations.

In the Nigerian cases of *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*,¹⁴⁷ *Machine Umudje & Anor v Shell-BP Petroleum Development Company Nigeria Ltd*.¹⁴⁸ The courts have affirmed the application of the strict liability doctrine in Nigeria, which imposes a stricter liability than that in the common law of negligence. For the strict liability doctrine is otherwise considered a liability without fault; the defence of ‘diligence and vigilance’ does not exonerate the polluter from liability as it is clearly demonstrated in the case of *Rylands v Fletcher*. Furthermore, in *Shell Petroleum Development Company of Nigeria Ltd v Abel Isaiah and others*,¹⁴⁹ the trial Court as well as the Court of Appeal did affirm the plaintiff’s claim for damages in negligence and strict liability under *Rylands v Fletcher*. The only shortcoming on the latter case was the position of the Supreme Court that a State High Court lacks jurisdiction to entertain issues on petroleum mining operations which includes environmental pollution caused by oil and gas activities. It is submitted that the doctrine of strict liability is fully appreciated and utilised by the courts in deciding issues on environmental pollution caused by oil and gas, and in view of this, there is no doubt that the doctrine has come to stay in the Nigerian liability framework. However, elements of the strict liability rule, the common law of negligence and nuisance are incorporated into extant laws on environmental liability in Nigeria, particularly, the Oil Pipelines Act 2004.¹⁵⁰

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ECOWAS Court Jurisdiction (n 83).

147

[1973] MWSJ 61 (Per Ovie Whiskey J).

148

[1975] 19-11 SC 155.

149

[2001] 2 NWLR (Pt 723) 168 at 178-179.

150

See discussion in figure 5.4 on responsibility and compensation in oil and gas pollution incidents in Nigeria.

The focal point of this research is on the enforcement of fundamental environmental rights.¹⁵¹ Having observed via case law, that the strict liability principle is applicable to ordinary rights related to compensation and damages in environmental matters, it is argued that a stricter liability is deployed in fundamental rights enforcement. Such liability, as closely examined above is absolute in that where fundamental rights to life and dignity of the human person are violated, a polluter would not escape liability if it furnishes the court with evidence to the effect that activities were done with due diligence and vigilance, or that it was an act of a third party, or that there was statutory authority to embark on the said activities leading to violation of rights. In fact, this was explicit when the Federal High Court in the case of *Jonah Gbemre*,¹⁵² held that section 3(2)(a) and (b) of the Associated Gas Re-Injection Act 2004¹⁵³ as well as the section 1 of the Associated Gas Re-Injection (continued flaring of Gas) Regulations section 1.43 of 1984, under which gas flaring may be permitted are inconsistent with the applicant's rights to life and or dignity of human person as captured in sections 33(1) and 34(1) of the Nigerian Constitution respectively, and articles 4, 16 and 24 of the African Charter as mentioned earlier, and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution (which provides for the supremacy of the Nigerian Constitution).¹⁵⁴

In the Nigerian case of *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*,¹⁵⁵ the plaintiffs satisfied the Court with the prerequisite elements in a claim under strict liability doctrine which the Court aligned reasons with, but refused to accept the claim under *Rylands v Fletcher* on the ground that the activities of the defendant (SPDC) fell under the defence of

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The concept of fundamental environmental rights connotes the fundamental rights as discussed in this thesis which have been established via case law to include the right to a clean and pollution free environment.

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Jonah Gbemre (n 66).

¹⁵³

See Figure 5.3.4 on the provisions and explanations relating to the Power of the Minister of Environment to issue permit on gas flaring under the Associated Gas Re-Injection Act.

¹⁵⁴

Jonah Gbemre (n 66) 153.

¹⁵⁵

[1973] MWSJ 61 (Per Ovie Whiskey J).

‘statutory authority’, noting that the defendants are operating under a licence from the Federal government. In the light of the aforesaid, it is submitted that the defence of statutory authority is a remarkable defence in actions under strict liability doctrine, and if by virtue of the *Jonah Gbemre* case above, such a defence is declared incompatible with the Nigerian Constitution under fundamental rights enforcement, then, it is certain that a stricter liability will be visited on polluters. This submission is made, bearing in mind the shortcoming with the *Jonah Gbemre* case, being a judgment of the Federal High Court which has not yet been subjected to further tests of the Court of Appeal and Supreme Court. Despite this shortcoming, it is practically valid and rational, with regard to the importance of the right to life and dignity of human person for a conclusion to be made that a law or regulation permitting environmental pollution is inconsistent with the inherent right to life. As there is no doubt that a harmful environment poses a great threat to human life.

It is further maintained that if the defence of statutory authority can be considered incompatible with the Constitutional rights to life and dignity of human person, it would be plausible and healthy to reason and conclude that the other defences in strict liability, particularly, ‘acts of a third party’ which is mostly raised by TNCs, is not a justifiable ground to escape liability in fundamental rights proceedings; and in view of this stance, liability in would be considered absolute.

6.6 The Measure of liability in Fundamental Rights Violation Claims: A Brief Comparative Analysis between the Nigerian and Indian Jurisdictions.

It is worthy to briefly take a glance into the Indian legal system, particularly, the role of the Indian Constitution vis-à-vis the issues of human rights and the principle of the protection of the environment. This move is pursuant to the fact that the Drafters of the Nigerian Constitution of 1979 relied on the Indian Constitution to frame the Fundamental Objectives and Directive Principles of State Policy, including provisions on the environment,¹⁵⁶ and certain provisions in the Indian Constitution were known to be ignored.¹⁵⁷ In this regard, the Nigerian Court of Appeal did make reference to the Indian Constitution and the decision of the Indian Supreme Court in *Madras v Champakam*,¹⁵⁸ whilst attempting to resolve the

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This is contained in Chapter II of the Nigerian Constitution which is generally non-justiciable.

¹⁵⁷

Okon (n 36) 5.

¹⁵⁸

perceived conflict between the non-justiciability provisions in Chapter II of the Nigerian Constitution and the fundamental rights as enshrined in Chapter IV.¹⁵⁹ It would therefore be constructive and beneficial to consider the gap, if any, on the application of fundamental rights principles between the Indian judicial system and its counterpart in Nigeria, particularly owing to the fact that both jurisdictions were under British rule, and have inevitably obtained major parts of the English legal system; a close analysis, therefore would reveal the jurisprudential and procedural innovations both jurisdictions have made so far.

Article 21 of the Constitution of India¹⁶⁰ provides that: ‘No person shall be deprived of his life or personal liberty except according to procedure established by law.’ The aforesaid provision of the Indian Constitution on the fundamental right to life underpins the majority of decided cases on the nexus between human rights and environmental protection in the Indian legal system.¹⁶¹ It follows, through judicial precedent that ‘life’ is not only limited to a physical existence but also the quality of life.¹⁶² The Indian Supreme Court has corroborated the all-encompassing nature of the term ‘life’ to include human dignity and everything that makes life more suitable when Justice Bhagwati reasoned that:

We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing, and expressing oneself in diverse forms.¹⁶³

[1951] SCR 252.

¹⁵⁹

Okon (n 36). This referral was made by the President of the Nigerian Court of Appeal, Mamman Nasir (as he then was) in the case of *Bishop Okogie v Attorney General of Lagos state* (n 76).

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The One Hundredth Amendment of the Constitution of India, officially known as The Constitution (One Hundredth Amendment) Act 2015.

¹⁶¹

Gitanjali N Gill, ‘Human rights and the environment in India: access through public interest litigation’ (2012) *Env L Rev* 200, 204.

¹⁶²

ibid.

¹⁶³

See the case of *Francis Coralie v Delhi* [1981] AIR SC 746, 753.

In the light of the above, it would be plausible to hold that the right to life has a broader interpretation beyond the ordinary meaning of ‘existence’. Although there is no mention of environmental protection as an element of the fundamental right to life in the above observation by Justice Bhagwati, the right to a healthy environment, free from pollution has been inculcated in the subsequent case of *Virender Gaur v State of Haryana*¹⁶⁴ by the Indian Supreme Court when it observed that:

Article 21 protects the right to life as a fundamental right. Enjoyment of life... including the right to live with human dignity encompasses within its ambit, the protection and preservation of the environment, ecological balance free from pollution of air and water, sanitation, without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air and water pollution, etc., should be regarded as amounting to a violation of Article 21. Therefore, a hygienic environment is an integral facet of the right to a healthy environment... There is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard a proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man made and the natural environment.¹⁶⁵

The above observation from the Supreme Court of India is an expansive and coherent interpretation of the fundamental right to life to include environmental rights. This observation is in line with what is obtainable in the English jurisdiction and the Nigerian legal system as shown in the discussion in chapter 2. The Indian Constitution, just like its counterpart in Nigeria,¹⁶⁶ contains certain provisions under the Fundamental Objectives and Directive Principles of State Policy which are related to environmental protection, and equally non justiciable.¹⁶⁷ On the other hand, part III of the Constitution set out its fundamental rights which are enforceable. Article 21 which sets out the right to life, as

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[1995] 2 SCC 577.

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ibid 580-581.

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The Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Nigerian Constitution have been discussed to be non-justiciable except such provisions are incorporated into an Act of the National Assembly (see discussions in figure 2.5).

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The directive principles of state policy are outlined in Part IV of the Indian Constitution and article 37 of the Indian Constitution is to the effect that matters under part IV cannot be enforced in a law court.

interpreted by the Indian Supreme Court to include environmental rights,¹⁶⁸ falls under part III. Certainly, legal arguments may erupt on the intentions of the Constitution drafters to include environmental rights as fundamental rights (under right to life), since principles relating to environmental protection are meant to be mere declaratory as ordinary Objectives of the State.

It is interesting to note that the Indian Judiciary has developed a constitutional doctrine of 'harmonious construction'.¹⁶⁹ The essence of the doctrine is to strike a balance or create a harmonious interpretation between any perceived conflict of interest between the non-justiciable provisions as found in part IV and the fundamental rights as contained in part III of the Constitution. The doctrine is to the effect that the States are under a discretionary obligation to implement the Fundamental Objectives and Directive Principles of State Policy under part IV of the Constitution but it must be carried out in such a manner that will conform with the fundamental rights of citizens.¹⁷⁰ This same doctrine of harmonious construction is reflected in Nigeria in the position of the Court of Appeal in *Bishop Okogie (Trustee of Roman Catholic schools) & Ors v Attorney-General of Lagos State*¹⁷¹ to the effect that: '...no provision in chapter II can override or inhibit the provisions of Chapter IV on fundamental rights.'

The measure of liability which is retained by the Indian Judiciary for individuals or corporate bodies who have caused injury or damage to others as a consequence of their engagement in hazardous or inherently dangerous activities, was enunciated by the Supreme Court in the case of *MC Mehta v Union of India*.¹⁷² Again, it is noteworthy to mention that the Indian

¹⁶⁸

Virender Gaur v State of Haryana (n 164).

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The doctrine of harmonious construction has been emphasised in the cases of *MH Quareshi v State of Bihar* [1958] AIR SC 751. And *Re Kerala Education Bill* [1958] AIR SC 956.

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Okon (n 35).

¹⁷¹

Bishop Okogie (n 76) at 350 and 351 (Justice Mamman Nasir).

¹⁷²

[1987] AIR SC 1086.

case-law in this regard is relevant owing to the fact that both Nigeria and India were under British rule and have consequently retained English common law rules in determining liability of different sort. Whilst addressing the issue whether the English rule of strict liability as emphasised in the case of *Rylands v Fletcher*¹⁷³ would be applicable in violation of Constitutional rights, particularly, the violation of Fundamental Rights to life as captured in Article 21, the Indian Supreme Court was of the view that the principle in *Rylands*' case evolved at a time when the standard of science and technology was still very low compared to what is obtainable at the moment (1986, when the judgment was delivered), and as a result, the doctrine of strict liability cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure in India. This observation of the Supreme Court of India is pursuant to the fact that law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. In analysing the nature of liability involved in India vis-à-vis the liability for environmental polluters, the Court stated that:

...We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.¹⁷⁴

The above position of the Indian Supreme Court is a true reflection of the doctrine of absolute liability, as the Court has equally made it very explicit that none of the exceptions as

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[1861] All ER Rep 1 (HL) the strict liability rule in the case of *Ryland v Fletcher* as discussed in chapter 1 of this research provides that a person who for his own purpose brings on to his land and collects and keeps there anything likely to do mischief, if it escapes must keep it at his peril and, if he fails to do so, is prima facie liable for the damage which is the natural consequence of its escape. There are series of defences which a defendant could raise, thereby making liability strict, but not absolute.

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applicable in strict liability¹⁷⁵ will exonerate any enterprise involved in such hazardous damage. It could be extrapolated in light of the above that the nature of liability which is utilised in tortious actions varies from that applicable in Constitutional cases under fundamental rights enforcement. Whilst the nature of liability applicable in torts of nuisance, negligence and strict liability cases as well as in enforcement of the Convention rights are clearly spelt out in the English legal system as discussed in chapters 1 and 2 of the research, the applicable standard of liability involved in fundamental rights enforcement relating to environmental pollution incidents in Nigeria and India seem to be vague in that it is not clearly captured in specific codes, thereby prompting the courts to exercise their inherent discretions in giving meaning to the law in this emerging area. This latter submission is informed on the basis that sections 33 and 34 of the Nigerian Constitution and Articles 4, 16 and 24 of the African Charter respectively are silent on the standard of liability involved in cases of violations of fundamental rights. This is equally the case in Article 21 of the Indian Constitution. Consequently, due to the fundamental nature of these rights, the courts are more obliged to develop liability principles relating to breach of these environmental rights in a stricter or absolute sense than is obtainable in other claims bordering on ordinary rights.

In another striking case of *Union Carbide Corporation v Union of India*,¹⁷⁶ where the release of highly toxic substance by the Union Carbide Corporation (defendant) was said to have led to the deaths of over 2,500 persons and more than 200,000 people maimed for life,¹⁷⁷ the Madhya Pradesh High Court, while holding the defendant liable for the damages caused to its victims, aligned reasoning with the position of the Supreme Court in *MC Mehta*¹⁷⁸ as regards the principle of absolute liability. The defendant was held liable without any of the exceptions as applicable in the English doctrine of strict liability. It is apparent in the light of

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The defences which can be raised by a defendant in a strict liability claim are fully discussed in chapter 1, under figure 1.5 of this research, and they include: Act of God, consent of the claimant, default of the claimant, statutory authority and act of a third party.

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In the Indian Madhya Pradesh High Court, Civil Revision Petition No. 26 of 1988 (per Justice Seth)

¹⁷⁷

Sushila Abraham and CM Abraham, 'The Bhopal case and the development of environmental law in India' (1991) ICLQ 334.

¹⁷⁸

MC Mehta (n 172).

the *MC Mehta* case and the *Union Carbide Corporation* case that the doctrine of Absolute liability holds sway mostly in cases of fundamental rights violations in India.

In view of the above decisions of the Indian Courts on the correlation between fundamental rights to life, enjoyment of private and family life, and human dignity on one hand and the enjoyment of an environment free from pollution on the other, it is clear that the three primary jurisdictions given consideration in this research (Nigeria, English and Wales as well as India) are unanimous to the fact that environmental pollution would violate and generate the enforcement of fundamental rights proceedings in the aforementioned jurisdictions. Whilst common law and statutory provisions relating to environmental liability are still prevalent in the aforesaid jurisdictions, it is shown that the Indian courts are far more determined to implement an absolute liability regime against industries engaged in hazardous or inherently dangerous activities within the ambit of fundamental rights enforcement, and this has been shown in a plethora of decided cases, most particularly in *MC Mehta v Union of India*,¹⁷⁹ which was a decision of the Supreme Court. This reminds us, once more of the initial hypothesis of this thesis, which is to ‘examine whether the doctrine of absolute liability may be applied to the principle of the protection of the environment in cases of fundamental rights violations by oil and gas operators.’

In the English and Wales jurisdiction, it is clear that the Human Rights Act of 1998 which embodied the European Convention Rights, particularly in section 1(2) is unambiguous to the fact that the Convention rights as applicable in UK are subject to ‘any designated derogation or reservation’, and in the English case of *Marcic v Thames Water Utilities Ltd*,¹⁸⁰ a public authority will be exonerated from any form of violation of the Convention rights if such authority is seen to have acted reasonably. Furthermore, Article 8(2) of the Convention rights permits violation of individual right to enjoyment of private and family life in circumstances where the incident amounting to the alleged violation is one that is for the economic well-being of the state. It is maintained that the standard of liability in the English jurisdiction, both in human rights cases on the one hand and common law and statutory liability regarding to hazardous activities causing harm to others on the other, hovers around principles of

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MC Mehta (n 172).

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[2003] UKHL 66, [2004] 1 All ER 135.

tortious liability under the strict liability rule, nuisance, negligence because of the requirement of public authorities acting ‘reasonably’, which is a requirement anchored on the aforesaid common law principles.¹⁸¹ Hence, there could not be identified any stricter liability standard attached to Human Rights or Conventions rights proceedings other than the ones applicable in the aforementioned tortious liability principles.

It would be plausible to reason that the position of the Federal High Court in the Nigerian case of *Jonah Gbemre*,¹⁸² which declared null and void the relevant sections of the Associated Gas Re-Injection Act permitting flaring of gas on the basis that such flaring violates applicants’ fundamental rights relating to the environment as captured in the Nigerian Constitution and African Charter, is in tandem with the position of the Indian Supreme Court in the *MC Mehta* case and others discussed above. This is clearly instructive to the extent that where activities of oil and gas operators causes harm to inhabitants, it will not be a defence to say that such injury was caused in the course of activities permitted or obliged by statute, or that a licence holder acted reasonably without negligence in a case of fundamental rights enforcement. It is argued that this development had incidentally triggered an absolute liability (or a stricter liability than the common law strict liability rule) regime within the ambit of fundamental rights. But unlike the Indian case law in this regard which is affirmed by the Supreme Court, the position of the Federal High Court in the *Jonah Gbemre* case is still subject to further validity tests, that is, the Nigerian Court of Appeal and the Supreme Court are yet to give any ruling on this; but until that is done, the *Jonah Gbemre* verdict still remains subsisting, logical and far-reaching. However, it would be pertinent to point out that as at the 4th of April, 2016, when an application to search the case file of the aforementioned case (*Jonah Gbemre v SPDC*) was put forward before the Assistant Director Litigation at the Federal High Court (Benin Division), it was confirmed that there is no pending appeal on the courts’ verdict, meanwhile the judgment was delivered in 2005.

6.7 Conclusions

The basis of this chapter is that: if there are fundamental rights and ordinary rights; and ordinary rights are treated with strict liability principles or principles in the common law torts

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See discussions in figures 1.4.1, 1.4.2 and 1.4.3 on nuisance, negligence and reasonable foreseeability, respectively.

¹⁸²

Jonah Gbemre (n 66).

of negligence and nuisance in the Nigerian environmental liability regime, then it is worthy task to test or examine whether a breach of the fundamental rights relating to environmental safety could be visited with a stiffer or an absolute liability regime. The purpose for such an examination, as is the purpose of the entire research, is to create an alternative platform under fundamental rights enforcement proceedings for victims of environmental pollution in Nigeria, and this is manifestly expedient owing to the numerous challenges encountered by victims of environmental pollution who pursue their claims via common law principles of liability and existing statutory regimes (particularly the Oil Pipelines Act 2004) applicable in Nigeria.

It has been shown that every jurisdiction retains its peculiar features and legal background, defined by economic, political and social factors, and although the English law principles were still retained in Nigeria and India, the law is modified and departed from the English practice on grounds of prevailing peculiarities and conditions in respective jurisdictions and subject matters. This is more evident in the sphere of environmental rights enforcement. The prevailing principle for liability under the Convention rights as applicable in the English Jurisdiction is reflected in the doctrine of the *Margin of Appreciation* which tends to strike a balance between the interests of the individual and the state.¹⁸³

In Nigeria, the right to life could only be interfered with in accordance with the execution of a court order, for the defence of any person from unlawful violence or property, to effect arrest and when suppressing riot or similar activities. Also, with regards to the right to dignity of human person, such right can be interfered during required labour of the armed forces, community labour and labours during national service. Albeit the Federal High Court seems to be silent on the measure of liability to be applied on violations of the constitutional right to life and dignity of human person, which has been interpreted to include environmental rights in *Jonah Gbemre v SPDC Nigeria*,¹⁸³ it is argued that such liability is absolute. In that case, the defendants were held responsible for ‘continuous flaring’ which was said to have violated certain fundamental rights to life and dignity of the person. It is admitted that, there is a scintilla of ambiguity on how ‘absolute’ liability could be in cases of violations of fundamental rights in Nigeria, but the Court has demonstrated its direction toward an absolute liability regime when it rendered the defence of ‘statutory authority’, (basically deployed in legal claims under strict liability, nuisance, negligence and others) to be incompatible with

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fundamental rights to life and dignity of human person within environmental rights enforcement.

The ECOWAS Court of justice has maintained that States must ensure that ‘vigilance and diligence’ are employed in activities which could lead to violations of individual rights to a safe environment. The concept of ‘diligence’ is in line with principles of the tort of negligence, but the term ‘vigilance’, appears to be a vague concept within legal jurisprudence; nonetheless, this has been interpreted to mean an intensified effort by the state to be diligent; hence, vigilance could be utilised as a litmus test or lens to determine the extent of ‘diligence’ exercised by the state or TNCs. In India, the courts have been very explicit to the fact that the common law doctrine of strict liability could no longer stand in cases of constitutional rights violations, and that liability in such cases is ‘absolute’.¹⁸⁴

Also, it is reasoned that the obligations and laws derived from the Fundamental Objectives and Directive Principles of State Policy in the Nigerian Constitution could only be considered to be ordinary rights (particularly when encoded in statutes) as against the fundamental rights contained in the sections of the enforceable parts of Constitution, except provisions of the African Charter which has benefited enhanced status from the Fundamental Rights (Enforcement Procedure) Rules 2009. The relevance of the discussion on the aforesaid ordinary rights is that they are utilised as a means for testing whether there can be any improvement on the standard of liability to be conferred on polluters in fundamental rights enforcement proceedings.

It is conclusively stated that owing to the defences attached to the strict liability rule and other common law torts, as embodied in the extant statutory schemes regarding environmental pollution claims in Nigeria, such as the defence of ‘statutory authority’, ‘acts of a third party’ and others,¹⁸⁵ the aforementioned liability principles cannot sustain the current challenges of environmental abuse pursued through fundamental rights proceedings, hence the need to create a legal ambience for constitutional rights to augment by retaining the doctrine of absolute liability. In this vein, absolute rights would connote those fundamental

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See the cases of *MC Mehta v Union of India* [1987] AIR SC 1086 and *Union Carbide Corporation v Union of India* [1988] in the Indian Madhya Pradesh High Court, Civil Revision Petition No. 26 of 1988 per Justice Seth.

¹⁸⁵

See the basic defences to the strict liability rule as discussed in chapter 1 of this research under 1.5.

rights under the Nigerian Constitution and the African Charter that cannot be interfered with, no matter how important the public interest in doing so might be. This is because issues of convenience should not be seen to override fundamental rights, due to their constitutional supremacy.

CONCLUSIONS

A key research question is asked: will the polluter be absolutely liable in fundamental rights enforcement proceeding predicated on the violation of the rights to life, dignity of human person and enjoyment of private and family life where environmental protection is disregarded by oil transnational corporations (TNCs)? This question is answered in the affirmative after a critical analysis of existing principles of liability in Nigeria, ranging from existing English common law liability rules and statutory provisions on oil and gas pollution claims on one hand, and the provisions of Chapter IV of the Nigerian Constitution 1999 as well as the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act 2004 on the other.

It is trite that the Nigerian legal system maintains substantial similarities with English law, Nigeria being a former colony of Britain. Such legal similarities are mostly seen where there are lacunas in the Nigerian legal system. One major source of Nigerian law is the ‘received English law’, the ‘received English law’ includes; the common law, doctrines of equity and the statutes of general application, being laws made before 1900.¹ This simply implies that the English common law is automatically received in Nigeria but Subject to Nigerian legislation and policies² which have emerged due to the peculiar demands based on jurisdictional differences. Whilst it has been noticed that oil and gas pollution incidents are very frequent in Nigeria, particularly in the Niger Delta region, it is clear that such cases of pollution are less frequent in the United Kingdom. This explains the frequent concern and attention given by patriotic Nigerians on issues of environmental pollution; as it is equally reflected in this current research, prompting an argument for absolute liability via fundamental rights enforcement proceedings.

Victims of environmental pollution have always explored means to seek for compensation, and in most cases, such desire for redress has led both victims and polluters to end up in courts. The courts are then left with the larger onus in framing a standard for measuring

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VI Mbu, ‘Problems of the Nigerian Legal System in the light of the Analytical Jurisprudence of Norzick and Rawls’ (1994) 6 SLJIL 111, 117.

²

Mbu (n 1).

liability of oil operators based on available evidence. It is this burden of proving the liability of TNCs and other cases of environmental harm caused by individuals that has raised liability principles in the torts of nuisance, negligence, strict liability, and even an absolute liability in the current research.

In the English common law jurisdiction, the concept of strict liability was first made vivid in the case of *Rylands v Fletcher*.³ In this doctrine, certain elements are needed in order to establish the strict liability of polluters or those who have caused harm to others. In proving a case of strict liability, the claimant must show that the defendant brought something to his land; that the thing is of the kind that is likely to do mischief if it escapes; that the thing is a non-natural use of land, and that the thing finally escaped. All these elements were discussed in chapter 1 under figure 1.3. The doctrine of strict liability has actually raised a lot of academic debate on whether having regard to the need to establish the aforementioned ingredients, it can still be said that the defendant is ‘strictly liable’ for his activities which had caused damage to the claimants. Some scholars and writers are of the view that the doctrine is fault-based, that is, the claimants must be able to establish the aforementioned ingredients thereby establishing that the defendant is at fault before the courts can establish liability based on the available evidence. Adherents of this school of thought are of the view that strict liability rule under *Rylands v Fletcher* is only an extension of existing principles of the common law tort of nuisance and negligence, which are generally ‘no liability without fault’ concepts.

On the other hand, some scholars are of the contention that the doctrine of strict liability does exist, and it is unique and relevant to contemporary issues of environmental harm. Contenders of this latter standpoint are of the view that the rule of strict liability is applicable to cases of hazardous substances or activities of the defendant. It is noted by AJ Waite⁴ in his analysis of the case of *Transco Plc v Stockport MBC*,⁵ that there are circumstances, however small, in which it is justifiable for the courts to impose liability without fault, particularly

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[1861-73] All ER Rep 1 (HL).

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Andrew J Waite, ‘Deconstructing the rule in *Rylands v Fletcher*’ (2006) 18 JEL 423.

5

[2003] UKHL 61, [2004] 2 AC 1.

where the dangerous nature of the substance or activity is foreseeable. The requirement of foreseeability of harm of the dangerous activities of the defendant has been considered by the House of Lords in the cases of *Cambridge Water Co Ltd v Eastern Counties Leather Plc*,⁶ and later in *Transco Plc v Stockport MBC*⁷ as a unique feature of strict liability torts.

In chapter 1 of this research, a brief comparative analysis between the torts of negligence and that of the strict liability rule under *Rylands v Fletcher* was showcased (see figure 1.4.3). It is contended by Gerhart⁸ that the rules of strict liability under *Rylands v Fletcher* can best come under the tort of negligence. It is maintained, in the light of Gerhart's contention, that there are areas of differences between the common law tort of negligence and the rule of strict liability. In negligence, it is obvious that the claimant must contend that the defendant owed him a legal duty of care, and that the breach of such duty has caused him (defendant) injury or damage. The primary requirement therefore in a case of negligence is to determine via preponderance of evidence whether the defendant exercised 'reasonable care' or not. Where it is established from the balance of probabilities that the defendant was 'reckless' over the outcome of his activities towards his neighbour, then liability will be imposed where the neighbour can show damages suffered. On the other hand, it is made obvious in the light of the *Transco*⁹ case that the primary requirement of strict liability cases under *Rylands v Fletcher* is that the defendant must have the foresight of the dangerous nature of his activities or substance. With regards to the latter stance, it is observed that foreseeability of harm is both a requirement in negligence and nuisance. But under the strict liability rule, the foreseeability of the escape of such dangerous thing is irrelevant insofar as damage is caused to the claimant (victim). It follows that, the fact that the defendant was 'reckless' over the escape of the dangerous thing is irrelevant in determining liability under *Rylands's* rule, but proof of 'recklessness' in the tort of negligence is a *sine qua non*.

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[1994] 2 AC 264 (HL).

7

Transco (n 5).

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Peter M Gerhart, 'The Death of Strict Liability' (2008) 56 Buff L Rev 245, 246.

9

Transco (n 5).

Another aspect of the common law which is said to have given hand to the doctrine of strict liability as established in *Rylands v Fletcher* is the tort of nuisance. Turner and Hodge have pointed out that ‘actions in nuisance can lie for oil spills, nasty smells, noise and anything else which affects nearby land or the comfort and convenience of the occupiers of that land’.¹⁰ There is no doubt that the torts of nuisance and strict liability offences as established in the *Rylands* case, share similar features. In the tort of nuisance, the defendant can be exonerated from liability where he can show that he has done what is reasonable in order to avoid the risk of harm.¹¹ In essence, the lack of ‘reasonable use’ of land by the defendant will attract liability against the defendant in nuisance. Lord Goff in the *Cambridge Water Co Ltd v Eastern Counties Leather Plc*¹² has convincingly established that there are no striking differences between the tort of nuisance and that of strict liability in *Rylands v Fletcher*. It was made clear in the *Cambridge Water* case that foreseeability of harm of the substance or activities of the defendant is a prerequisite in both torts of nuisance and the strict liability rule.¹³ In essence, in both cases of nuisance and the rule in *Rylands v Fletcher*, the defendant cannot be liable for a harm which he could not foresee. However, Lord Goff pointed out a possible area of difference between strict liability rule and the tort of private nuisance when he said:

... It would moreover lead to a more coherent body of common law principles if the rule were to be regarded essentially as an extension of the law of nuisance to cases of isolated escapes from land, even though the rule as established is not limited to escapes which are in fact isolated.¹⁴

¹⁰

Chris Turner and Sue Hodge, *Unlocking Torts* (2nd edn, Hoder Arnold 2007) 300.

¹¹

Turner and Hodge, *Unlocking Torts* (n 10) 312.

¹²

Cambridge Water (n 6).

¹³

ibid 301-306.

¹⁴

Cambridge Water Co Ltd (n 6) 306.

Furthermore, Lord Hoffmann in the *Transco*¹⁵ case made reference to Lord Goff's position in Cambridge Water case, pointing out that the novel feature of liability under *Rylands v Fletcher* is that the defendant will be liable even if he could not reasonably have foreseen that there would be an escape.¹⁶ In view of the aforesaid remark and in light of recent considerations, it is submitted that the doctrine of strict liability is still in existence, but the doctrine is not 'absolute' having regard to the need to establish 'foreseeability of harm', coupled with the defences associated with the doctrine. However, there is no doubt in the English jurisdiction that 'oil and gas' are considered as 'dangerous things' having regard to the cases of *Batcheller v Tunbridge Wells Gas Co*,¹⁷ and that of *Colour Quest Ltd v Total Downstream UK plc*,¹⁸ as discussed in chapter 1 of this thesis. It is maintained that in order to avoid unnecessary regime of instability in the legal system, all principles and requirements relating to the strict liability of oil and gas pollution be encoded into statutes.

At the international level, most conventions and treaties have emphasised the need for polluters to be directly responsible to the consequences of their ultra-hazardous activities. It is shown that issues of strict liability can be found in international conventions and treaties. One relevant international decision where the doctrine of strict liability has found its way in, is the *Trail Smelter Arbitration*.¹⁹ But this case, looking at the attitude of members of the arbitral tribunal not to seek for requirements of foreseeability of harm and or other defences in strict liability, makes it almost probable to conclude that liability was absolute.

In the light of the analysis of the Nigerian laws on environmental pollution in chapter 5 of this research, and the analysis of decided cases in Nigerian courts in chapter 1, it is clear that

¹⁵

Transco (n 5).

¹⁶

Transco (n 5) 17 [33] (Lord Hoffmann).

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[1901] 84 LT 765 (Ch D).

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[2009] EWHC 823 (Com Ct), [2009] All ER (D) 311.

¹⁹

Trail Smelter Arbitration (USA/CANADA) (1941) 3 Reports of International Arbitral Awards <http://untreaty.un.org/cod/riaa/cases/vol_iii/1905-1982.pdf> accessed 10 July 2013.

the doctrine of strict liability has found its way in the Nigerian legal system with its limitations. The victims of oil and gas pollution can raise claims under the doctrine of strict liability in Nigeria through existing laws and reliance on case-law. In the Nigerian cases of *San Ikpede v Shell Petroleum Development Company Nigeria Ltd*,²⁰ *Machine Umudje & Anor v Shell-BP Petroleum Development Company Nigeria Ltd*,²¹ *Shell Petroleum Development Company of Nigeria Ltd v Abel Isaiah and others*,²² and a couple of others, it is clear that the Nigerian Courts are versed and open to the application of strict liability principles in cases of oil and gas pollution.

Also, by virtue of section 11(5)(c) of the Oil pipelines Act 2004²³ provides, inter alia, that the holder of a licence shall pay compensation to any person who has suffered damage as a result of any breakage or leakage from pipeline or any other installation. The only qualification in the aforementioned provision is that a victim of such pollution cannot be entitled to any compensation where the breakage or leakage was as a result of his default or the malicious act of a third party. It is obvious that this provision is the statutory version of the rule in *Rylands v Fletcher* since the burden to prove that the damage was caused by the claimant or a third party will rest on the defendant. Even at this, it is argued that once damage is foreseeable, TNCs should be held absolutely liable, since activities of ‘third parties’ are equally foreseeable acts that can be curtailed by TNCs.

By virtue of section 37 of the Petroleum Act 2004,²⁴ the holder of an oil exploration licence in addition to any other liability is liable to pay ‘fair and adequate compensation’ for the disturbance of surface or other rights to any person who is in lawful occupation of the licensed land. Although this section seems to restrict compensation to persons who have

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[1973] MWSJ 61 (Ovie Whiskey J).

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[1975] 19-11 SC 155.

²²

[2001] 2 NWLR (Pt 723) 168 at 178-179.

²³

Oil Pipelines Act Cap O7 LFN 2004, s 11(5) (c).

²⁴

Petroleum Act Cap P10 LFN 2004, s 37.

personal interest in the polluted land, liability here is strict since the section is concerned about additional compensation to victims irrespective of the nature of any other liability which the defendant will be subjected to.

Other statutes such as the Oil in Navigable Waters Act 2004,²⁵ Associated Gas Re-Injection Act,²⁶ Harmful Waste (Special Criminal Provisions) Act 2004,²⁷ establishes varying kinds of liability on environmental polluters, except where such pollutions occur with reasonable precaution on the part of polluters or with the permission of the Nigerian government. It is submitted that such exceptions (exercise of reasonable care and statutory authority) might not exonerate the polluter from liability where the pollution caused is said to have breached the fundamental rights of the victims as enshrined in the Nigerian Constitution. Generally, in determining whether oil operators are negligent, the courts would likely utilise similar standards as that of the *Bolam Test* as found in the case of *Bolam v Friern Hospital Management Committee*.²⁸ This would require the court to consider whether the polluter acted in line with global best practices in the events leading to pollution.

It is observed that considering the defence of ‘statutory authority’ under the strict liability rule and under the aforesaid statutes in Nigeria with regard to environmental pollution cases, it would be plausible to conclude that the rule of strict liability as known in *Rylands* is not necessarily effective or applicable in Nigeria since the defence of statutory authority (which is major defence under the rule), if applied would automatically curtail the need to institute legal actions against TNCs. Owing to this, the courts traditionally rely on the standards of liability in the torts of negligence and nuisance in cases of environmental pollution. That is, the Courts are more concerned whether TNCs acted with ‘due care’ or ‘reasonably’ in their activities with a view to determine liability.

²⁵

Cap O6 LFN 2004.

²⁶

Cap A25 LFN 2004.

²⁷

Cap H1 LFN 2004.

²⁸

[1957] 2 All ER 118.

At an international level, it is maintained that the current liability regime is in favour of the standard of liability required in the tort of negligence, particularly because of the need to prevent harm from befalling others, and prevention of harm is a key element in negligence. In the case of *Argentina v Uruguay*²⁹ (the ‘pulp mills dispute’) the International Court of Justice observed the applicability of the principle of negligence in the following remark:

The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a state in its territory. It is “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states” (*Corfu Channel, United Kingdom v Albania*), merits, Judgment, ICJ Reports 1949, p.22). A state is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction causing significant damage to the environment of another State. This Court has established that this obligation “is now part of the corpus of international law relating to the environment” (*Legality of the Threat or use of Nuclear Weapons, Advisory opinion*, ICJ Reports 1996(1), p.242, para. 29).³⁰

It is observed that the *Pulp Mills* judgment anchoring liability for international harm on principles of negligence (prevention and due diligence)³¹ was reached in error. This is because the construction of the Mills and its attendant harm was a foreseeable act, which should attract a strict and/or absolute liability. It is submitted that where damage is foreseeable and there is no third-party intervention, liability should be absolute, irrespective of the claim for deployment of ‘due diligence’.

In the same vein, the African Commission in the communication of *Social and Economic Rights Action Centre (SERAC) and Another v The Federal Republic of Nigeria*,³² and the ECOWAS Court of Justice in the case of *Socio-Economic Rights and Accountability Project*

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Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep14.

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Pulp Mills (n 29) [101].

³¹

Pulp Mills (n 29) para 101.

³²

[2001] AHRLR 60 Communication 155/96, decided at the 30th ordinary session, October 2001 of the African commission.

(*SERAP*) v *The Federal Republic of Nigeri*,³³ have emphasised on the need for states to exhibit reasonableness and care³⁴ as well as ‘vigilance and diligence’³⁵ respectively, with a view to prevent environmental pollution which directly affects the rights to a healthy environment of citizens. It is observed that these aforesaid requirements are all elements of the common law torts of nuisance and negligence.

In another perspective, the doctrine of strict liability is conspicuously seen to be applicable in the Convention of Civil Liability for Oil Pollution Damage 1992 (which Nigeria is a signatory). This Convention is exclusively applicable to registered ship-owners who are found to have discharged oil at sea. In circumstances where the ship is not registered, liability will be traced to the person (s) owning the ship, and by virtue of Article 1(2) of the 1992 Convention, ‘person’ includes states or corporations owned by the state.

Also, it is noteworthy to mention that judges are inclined to express independent opinions on the basis of their perceptions on legal issues, particularly where the law is ambiguous. This explains the concept of case law in legal parlance. Lord Denning affirmed this concept in the case of *Magor and St Mellons Rural District Council v Newport Corporation*,³⁶ when he said:

We sit here to find out the intention of parliament and ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.³⁷

The above position is practically seen in the series of cases relied upon in the current research, where judges have creatively and expansively interpreted statutory and

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³⁴ Socio-Economic Rights and Accountability Project (*SERAP*) v *The Federal Republic of Nigeria* [2012] Community Court of Justice, ECOWAS (Judgment N0 ECW/CCJ/JUD/18/12).

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SERAC v *FRN* (n 32) [52], [54].

³⁶

SERAP v *FRN* (n 33) [112].

³⁷

[1950] 2 All ER 1226 (CA).

³⁸

Magor’s case (n 36) at 1236.

constitutional provisions. The judgment of the Federal High Court in the *Jonah Gbemre* case is instructive in this regard.

It is shown that the terms human rights and fundamental rights, in most cases, are used interchangeably. But in more practical terms, fundamental rights are those rights recognised by various statutes or laws and could be enforced when violated. Notwithstanding, the significance of the concept of human rights (which is basically associated with natural law) is not to be totally overruled, because at the time when natural law philosophers and other apologists considered principles of natural law as constituting ‘law’, the legal regime was remarkably dominantly centred on divine or religious norms, and such laws or religious norms were seen to be enforced within the society where they apply. However, it is clear that as the people’s awareness on the concept of law progresses, it became obvious that some laws or rights are glaringly inalienable and deserves to be encoded and given higher status, thereby necessitating the embodiment of principles of fundamental rights. But even at this, the human rights and fundamental rights are still used interchangeably. In line with the Fundamental Rights (Enforcement Procedure) Rules 2009 applicable in Nigeria, ‘human right’ is used as a mother term to include fundamental right, and specifically, ‘fundamental rights’ are defined to mean any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act 2004.³⁸ Nevertheless, it is worth mentioning that the current research is concerned with making environmental pollution a matter of fundamental right.

Having established the special value attached to fundamental rights, it is said that the violations of the rights to life, dignity of the person as well as private and family life, at both municipal and international levels include a violation of environmental right (the right to a safe environment), even if the latter right is not explicitly stated in most world treaties and domestic laws as discussed in the body of the research. This inclusion of environmental right to the aforesaid rights has been described as a genuine display of the Courts’ discretionary jurisdiction in creatively and expansively interpreting legal provisions. It is observed that an environment degraded by pollution is contrary to satisfactory living conditions and the development of personality, as well as harmful to physical and moral health. In essence, it is concluded that once the environment is polluted by activities of TNCs, the aforementioned fundamental rights, are directly violated. It follows that, the right to life is dependent on the

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right to a balanced and healthy environment, and issues of environmental protection should be unequivocally linked with provisions of fundamental rights.

Having considered the nature of liability involved in torts of nuisance, negligence, and strict liability under *Rylands v Fletcher*, it is argued that the measure of liability obtainable in events of infringement of the rights to life and dignity of human person ought to be stricter, even absolute, due to their enhanced status over and above ordinary claims; for the importance of fundamental rights have been affirmed by the Nigerian courts in different occasions.

Absolute liability has been utilised within the context of this research as a phrase to depict a case where liability attaches to a person on the happening of given condition and despite any care that person may have taken and despite any facts suggesting the happening was beyond human foresight, and without any requirement to raise the common law defences of Act of a stranger, statutory authority and others that could exonerate liability of defendants in a case of strict liability as found in *Rylands v Fletcher* (see figure 6.4.1), and having established a correlation between environmental pollution caused by oil and gas activities of TNCs and the violation of fundamental rights to life, dignity of human person and private and family life as captured in the Nigerian Constitution as well as the right to a satisfactory environment provided for in the African Charter (which is now a municipal enactment in Nigeria), it is concluded that these rights as contained in the aforesaid enactments have no known defence or excuse which is relevant within the activities of oil industries to be raised in a proceeding for the enforcement of fundamental rights in an environmental perspective (see figures 6.4 and 6.4.1).

The constitutional defences for the right to life are execution of the sentence of a court, defence of person from unlawful violence or property, to effect lawful arrest or prevent escape of detained persons, suppressing in riot, insurrection or mutiny. The aforesaid are the only defences known in the Nigerian Constitution regarding the right to life. In the same vein the only grounds under which the right to dignity of the person (inhuman or degrading treatment) can be interfered with are in the circumstance of forced labour, in consequence of the sentence or order of a court, labour required of members of the armed forces, any labour reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the community, compulsory national service which forms part of the education and training of citizens as may be prescribed by an Act of the National Assembly. Article 24 of

the African Charter was even more absolute without any reservation when it provides that 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

In view of the foregoing, and in view of the established link between environmental pollution incidents and fundamental rights violation in Chapter IV of the Nigerian Constitution, it would be plausible in law to conclude that where the Constitution or statute is silent as to any defence or exception, the application and argument for such a defence would be rebutted, since the drafters never contemplated for such an extraneous defence. In essence, it would be incompatible with provisions of the Constitution and even of the African Charter (which are given higher priority) for environmental polluters to raise any of the defences in the common law of negligence, nuisance or strict liability in a case for fundamental rights enforcement; for in strict compliance with legal positivism, those defences are not known to the Nigerian Constitution, and it could be argued that bearing in mind the supremacy of the Nigerian Constitution, all defences of Act of a third party, exercise of due care and reasonability and statutory authority as found in the Oil Pipelines Act, Associated Gas Re-Injection Act and the Petroleum Act as mentioned in chapter 5 are to the extent of their inconsistencies with constitutional provisions, void. This latter stance was affirmed by a Federal High Court in Nigeria in the case of *Jonah Gbemre (for himself and as representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd and others*. Furthermore, it is mentioned that where the environment is polluted via activities of oil and gas of oil transnational corporations in Nigeria, victims who can show that the quality of their private lives and the enjoyment of their homes have been affected, and who intend to institute proceedings under fundamental rights enforcement would deem it fit to raise arguments for violation of the right to private and family life as provided for in section 37 of the Nigerian Constitution. It is maintained in the current research that environmental pollution should not only be a matter of 'human right' but a matter of fundamental right due to the direct effect of pollution incidents on human life.

On the other, the ECOWAS Court of Justice and the African Commission are seen to be inclined to a regime of principles of negligence in determining cases of violation of human rights relating to environmental pollution incidents. This can equally be described to be the case in England and Wales, as the municipal courts have subscribed to the doctrine of the *Margin of Appreciation* developed by the European Court of Human Rights, which ordinarily

is a joint application of liability principles in nuisance and negligence rather than an absolute liability for the Convention rights.

The research identified five key challenges among others in obtaining environmental justice within the ambit of fundamental rights enforcement, namely: the economic benefits of the state,³⁹ the defence of ‘act of third party’⁴⁰ frequently raised by TNCs to escape liability, the lack of public awareness in promoting environmental rights,⁴¹ vagueness and technicalities in extant common law principles in establishing environmental liability against TNCs, and the lack of direct constitutional provisions to a safe environment. The economic grounds argument is developed and expansively interpreted to explain the ineffectiveness or non-implementation of existing laws in holding environmental polluters (particularly TNCs) liable for environmental damage, and consequently violating fundamental rights to a safe environment. It is concluded that the key reason for the reluctance of some governments, particularly in developing nations to inculcate fundamental rights to a pollution-free environment in their Constitution vis-à-vis activities of oil and gas is the fact that oil transnational corporations have been a major source of the economic live stream of these nations, and to open the door of fundamental rights enforcement in environmental matters is to open a flood gate of arbitrary and a plethora of judicial cases against these corporations, and if this is allowed, there is the tendency of victims obtaining series of court injunctions and compensations against oil industries, thereby obstructing the profits and activities of these companies and consequently having a direct effect on the fortunes of the nation.⁴²

It is observed that if such rights (environmental rights) are overtly enshrined and recognised in the Nigerian Constitution, the Nigerian courts would be flooded with legal actions relating to fundamental rights enforcement and this is primarily due to the growing number of oil

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See discussion in chapter 3 of the research

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See chapter 6 of the research.

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See chapter 4 of the research.

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See Chapter 3 of thesis on the analysis of bottlenecks connected to implementation of an absolute liability regime in fundamental rights enforcement.

spills in the country, particularly in the Niger Delta area where oil pollution incidents are predominant. In the Nigerian case of *Allar Irou v Shell BP*,⁴³ the court had refused an injunction to restrain the defendant (Shell BP) from continuous pollution of the defendant's land on the grounds that such an injunction would curtail the activities of the company which serves as a major source of income to the State. In this regard, it is observed that the Indian courts have made far-reaching jurisprudential innovations in the area of environmental rights enforcement more than can be seen in Nigeria. This is glaring in the position of the Indian Supreme Court in *MC Mehta v Union of India* and other related cases mentioned in figure 6.6.

It is recommended that since oil and gas activities are the mainstay of the Nigerian economy, and in effect cannot be truncated on grounds of economic well-being of the state, principles of liability should be strengthened with a view to improving responsibility whilst making issues of compensation moderate and bearable on the part of transnational corporations. It is concluded that enforcing fundamental rights to safe environment would secure higher standards of environmental quality and these rights should be directly incorporated in an enforceable Part of the Nigerian Constitution, preferably under Chapter IV of the Constitution which deals on 'Fundamental Rights'.

It is observed in the course of the research that TNCs have escaped and/or reduce the gravity of culpability in environmental pollution cases in a vast majority of the decided cases owing to the fact that most pollution incidents are traceable to 'acts of third parties' caused by sabotage. To avoid clumsy repetitions, it is submitted that this defence may not sustain TNCs in cases bordering on breach of environmental rights indirectly reflected in the Nigerian Constitution, 1999 and the African Charter, 2004 for two main reasons. One, it is maintained that if the rights to life, dignity of human person, and private and family life are to be expansively interpreted as contained in the Nigerian Constitution and African Charter, then the defence of 'act of third party' and other traditional defences in common law bordering on environmental liability may not sustain TNCs.⁴⁴ Notwithstanding, in *FA Akpan & Anor v*

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No W/81/71, Warri High Court, November 26, 1973.

⁴⁴

See arguments in figures 6.4, 6.4.1 and 6.5.

Royal Dutch Shell & Anor,⁴⁵ a Dutch Court has refused to uphold breach of fundamental rights relating to a clean environment instituted by a Nigerian, on the grounds that Shell (defendant) can only be liable for pollution incidents where negligence can be established, but not where pollution is caused by third parties.

Second, it is submitted that ‘acts of third parties’ are foreseeable, and if TNCs are proactive and diligent enough in curbing pollution, they would forestall such acts of ‘third parties’ owing to the obligation of government and TNCs to protect oil and gas facilities,⁴⁶ particularly within the perspective of fundamental rights enforcement.⁴⁷

It is on the basis of the foregoing that the research came up with the conclusion that on a scale of zero to ten (0-10), where 5 represents ‘strict liability’ and 10 represents ‘absolute liability’, environmental liability under fundamental rights enforcement, as argued in the current research should be pinned under 9, with limited space left for illegal activities of ‘third parties’ where pollution is shown to be manifestly unavoidable in events relating to illegal oil bunkering and acts of sabotage by vandals. This is predicated on the fact that in practical adjudication of oil and gas cases, courts are willing to consider the ‘acts of third parties’ and the efforts put in place by TNCs to address such foreseeable incidents. Owing to this, it is concluded that liability under fundamental rights enforcement will be stricter than the measure of liability applicable in the common law torts of nuisance, negligence and under the strict liability rule in *Rylands v Fletcher*.

It is maintained that fundamental rights enforcements within the ambit of environmental pollution is a nascent area of the law. In view of this, the issue of public awareness in addressing environmental challenges was raised.⁴⁸ The concept of public awareness is

⁴⁵

District Court of The Hague Case No. C/09/337050/HA ZA 09-1580, 30 January 2013 <<https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-shell-oil-spill-ikot-ada-udo>> accessed 12 January 2016.

⁴⁶

See *Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC) [93] on the possibility for an absolute liability against TNCs where damage is foreseeable and preventable under the traditional rules of liability and the Oil Pipelines Act, 2004.

⁴⁷

See the arguments for absolute liability under environmental rights enforcement in figures 6.4, 6.4.1 and 6.5.

⁴⁸

enumerated with a diverse consideration of complementary aspects such as: access to information on environmental matters, public participation in environmental decision-making, and access to justice in environmental disputes. It is stated that TNCs, local operators and government at all levels must intensify measures to disseminate environmental information to the locals, particularly in areas prone and well-known for oil spills,⁴⁹ and this must be done timely. In the same vein, public participation should be encouraged. An example of public participation in environmental decision making which appears practical on the part of government and TNCs is the Joint Investigation Visit during oil spills, which is shown to involve representatives of communities who have directly suffered from oil spills.⁵⁰

It is maintained that deployment of the Global Memorandum of Understanding (GMOU) by Shell and other oil operators which encourages an engagement with host communities, will create a platform for views to be exchanged, and through such and similar avenue, public participation would evolve and consequently address environmental concerns. The African Charter on Human and People's Rights which is now a municipal law in Nigeria promotes public participation to the effect that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives. In the same vein, the National Policy on Environment clearly supports the principle of public participation. However, it is seen that there is substantial gap in regular communications between locals on one hand and government and TNCs on the other. This is evident in plethora of reported cases of marginalisation, impunity and display of reckless behaviours on the part of oil operators and government. In view of this, it is recommended that there should be regular engagements with stakeholders in the host communities via town hall meetings that would encourage greater level of public participation.

A remarkable aspect of the concept of public awareness on environmental matters is the issue of access to environmental justice.⁵¹ This underpins the usefulness of the current research in

See figure 3.5.

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See figure 4.3.

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See figure 4.4.

51

This is discussed in figure 4.5.

the sense that enforcement of fundamental rights relating to environmental pollution would not generate reasonable effect or given much credence if victims of environmental pollution are unable to access the courts for justice. In view of this, it is recommended that government must take measures to cut down perceived bottlenecks in the area of jurisdictions, by allocating to State High Courts complete jurisdiction to entertain civil causes and matters relating to mines and minerals (including oil fields, oil mining, geological surveys and natural gas). This is due to the proximity of State High Courts to inhabitants of oil producing areas and locals, and also the increased number of State High Courts as against limited number of Federal High Courts (which currently retain exclusive jurisdiction on oil mining) as shown in section 251 of the Nigerian Constitution. Notwithstanding, it has been argued that victims of environmental pollution can enforce environmental rights via State High Courts in line with the special jurisdiction vested by the Nigerian Constitution under Chapter IV.⁵²

BIBLIOGRAPHY

PRIMARY SOURCES

Table of Nigerian Cases

Allar Irou v Shell BP, Suit No. W/89/71, Warri High Court, November 26, 1973

Attorney General of Ondo State v Attorney General of the Federation & Ors [2002] FWLR (Pt 3) 1972

Attorney General of Lagos State v Attorney General of the Federation & 35 Ors [2003] MJSC 1

AG Federation v AG Abia State & 35 Ors (2001) NWLR (Pt 725) 689

Anthony Atubin & Ors v Shell Petroleum Development Company Nigeria Ltd Unreported Suit no UCH/43/73 of 21/11/1974 (High Court of Ughelli Nigeria)

⁵²

See figure 4.5.1 on this conclusion.

Bishop Okogie (Trustee of Roman Catholic schools) & Ors v Attorney-General of Lagos State [1981] 2 NCLR 337 (CA)

Grace Jack v University of Agriculture, Markurdi [2004] 5 NWLR (Pt 865) 208

Jonah Gbemre v Shell Petroleum Development Company Nig Ltd [2005] AHRLR 151 (Federal High Court). The case can be found in the court records with suit No. FHC/B/CS/153/2005 (Federal High Court Benin Division)

Machine Umudje & Anor v Shell-BP Petroleum Development Company Nigeria Ltd, [1975] 19-11 SC 155

Nwankwo v Yar'adua [2010] 12 NWLR (Pt 1209) 518

Okpara v Shell Petroleum Development Company Nigeria Ltd & Ors, Suit No. FHC/PH/CS/518/2005, Unreported decision of the Federal High Court, Port Harcourt Division 29 September 2006

Panalpina World Transport (Nig) Ltd v JB Olandeen International & 4 Ors (2010) 19 NWLR (Part 1226) 1

San Ikpede v Shell Petroleum Development Company Nigeria Ltd [1973] MWSJ 61

Shell Petroleum Development Company of Nigeria Ltd v Abel Isaiah and others [2001] 2 NWLR (Pt 723) 168 (SC)

Shell Petroleum Development Company of Nigeria Ltd v Sirpi-Alusteel Construction Ltd [2008] 1 NWLR (Pt 1067) 128 (CA)

Sofekun v Akinyemi and others [1980] 5-7 SC 1

Uzoukwu & Ors v Ezeonu II & Ors [1991] 6 NWLR (Pt 200) 708

Social and Economic Rights Action Centre (SERAC) and Another v The Federal Republic of Nigeria [2001] AHRLR 60 Communication 155/96, decided at the 30th ordinary session, October 2001 of the African commission

Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria [2012] Community Court of Justice, ECOWAS (Judgment N0 ECW/CCJ/JUD/18/12)

Table of Nigerian Legislation

Constitution of the Federal Republic of Nigeria 1999 (as amended)

Associated Gas Re-Injection Act Cap A25 LFN 2004

African Charter on Human and People's Right (Ratification and Enforcement) Act Cap A9 LFN 2004

Environmental Impact Assessment Act Cap E12 LFN 2014

Freedom of Information Act No. 4 2011

Fundamental Rights (Enforcement Procedure) Rules 1979

Fundamental Rights (Enforcement Procedure) Rules 2009

Federal High Court Rules 2009 (Nigeria)

Harmful Waste (Special Criminal Provisions) Act, Cap H1 LFN 2004

Niger Delta Development Commission (Establishment etc) Act No. 6 LFN 2000

Oil in Navigable waters Act Cap O6 LFN 2004

Oil Pipelines Act Cap O7 LFN 2004

Petroleum Act Cap P10 LFN 2004

Petroleum (Drilling and Production) Regulation 1969

Netherland Case

FA Akpan & Anor v Royal Dutch Shell & Anor (District Court of the Hague) Case No. C/09/337050/HA ZA 09-1580, 30 January

2013<<https://milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-shell-oil-spill-ikot-ada-udo>> accessed 12 January 2016

Table of UK Cases

Batcheller v Tunbridge Wells Gas Co [1901] 84 LT 765 (Ch D)

The Bodo Community v The Shell Petroleum Development Company of Nigeria Ltd [2014] EWHC 1973 (TCC)

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 (QB)

Cambridge Water Co Ltd v Eastern Counties Leather Plc [1994] 2 AC 264 (HL)

Cameron v Network Rail Infrastructure Ltd [2006] EWHC 1133 (QB).

Caparo Industries plc v Dickman and others, [1990] 2 AC 605 (HL)

Chandler v Cape plc [2012] EWCA Civ 525, [2012] 3 All ER 640

Charing Cross Electricity Co v London Hydraulic Power Co [1914] 3 KB 772 (CA)

Colour Quest Ltd v Total Downstream UK plc [2009] EWHC 823 (Com Ct), [2009] All ER (D) 311

Donoghue v Stevenson [1932] AC 562 (HL)

Dunne v North Western Gas Board [1964] 2 QB (CA) 806

Esso Petroleum Co Ltd v Southport Corp [1956] AC 218 (HL)

Ellison v The Ministry of Defence [1996] 81 BLR 101 (QB)

Gregory v Piper [1829] 109 ER 220 (KB)

Marcic v Thames Water Utilities Ltd [2003] UKHL 66, [2004] 2 AC 42

Magor and St Mellons Rural District Council v Newport Corporation [1950] 2 All ER 1226 (CA)

Perry v Kendricks Transport Ltd [1956] 1 All ER 154 (Jenkins LJ) (CA)

Ponting v Noakes [1894] 2 QB 281 (QB)

Secretary of State for the Home Department v BC and BB [2010] UKHRR 354 Admin Ct, [2009] All ER 140 (QB)

Read v J Lyons & Co Ltd [1947] AC 156 (HL)

Rickards v Lothian [1913] AC 263 (PC)

Rylands v Fletcher [1861-73] All ER Rep 1 (HL)

Seaford Court Estates Ltd v Asher [1949] 2 All ER 155

Smartsource Drainage & Water Reports Ltd v Information Commissioner [2010] UKUT 415 AAC, Upper Tribunal (Administrative Appeals Chamber)

Smith v Littlewoods Organisation Ltd [1987] 1 All ER 710

Transco plc v Stockport Metropolitan Borough Council [2003] UKHL 61, [2003] All ER (D) 255

TSB Private Bank International SA v Chabra and another [1992] 2 All ER 245 (Ch D)

Westhoughton Coal and Cannel Company Ltd v Wigan Coal Corporation Ltd [1939] Ch 800 (CA)

Whitehouse v Gays News [1979] AC 617 (HL)

Table of UK Legislation

Environmental Protection Act 1990

Freedom of Information Act 2000

Human Rights Act 1998

Pollution Prevention and Control Act 1999 24

Water Industry Act 1991

Water Act 2003

The Environmental Information Regulations 2004 NO 3391

Scottish Primary Legislation

Freedom of Information (Scotland) Act 2002

Table of Indian Cases

Francis Coralie v Delhi [1981] AIR SC 746 at 753

Madras v Champakam [1951] SCR 252

MC Mehta v Union of India [1987] AIR SC 1086

Virender Gaur v State of Haryana [1995] 2 SCC 577

MH Quareshi v State of Bihar [1958] AIR SC 751

Kerala Education Bill, Re [1958] AIR SC 956.

Union Carbide Corporation v Union of India In the Indian Madhya Pradesh High Court, Civil Revision Petition No. 26 of 1988

Indian Legislation

The One Hundredth Amendment of the Constitution of India, officially known as The Constitution (One Hundredth Amendment) Act 2015

European Union Cases

Guerra v Italy [1998] 26 EHRR 357, [1998] 4 BHRC 63

Hatton and others v United Kingdom [2003] 37 EHRR 611, [2003] All ER (D) 122

Lopez Ostra v Spain [1994] 20 EHRR 611, [1994] ECHR 16798/90

Powell and Rayner v UK [1990] 12 EHRR 355, [1990] ECHR 9310/81

European Union Legislation

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

International Cases

Hungary v Slovakia [1997] ICJ (Separate opinion of Vice-President Weeramantry) 91-92.

<<http://www.icj-cij.org/docket/files/92/7383.pdf>> accessed 25 August 2015

Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits) [2010] ICJ Rep14

Trail Smelter Arbitration (United States/Canada), (1938) Vol III (Reports of International Arbitral Awards) 1905-1982

Phosphates in Morocco (Italy v France) (Preliminary Objections) [1938] PCIJ Series A/B No

Corfu Channel Case (UK v Albania) (Merits) [1949] ICJ Rep 4

Table of International Treaties/Conventions

Economic Community of West African States (ECOWAS) Revised Treaty (24th July 1993)

Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (No VIII)
1907

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November
1969)

International Covenant on Economic, Social and Cultural Rights (adopted 16th December
1966)

Protocol to the International Convention on Civil Liability for Oil Pollution damage (adopted
27 November 1992)

UN Human Rights Committee, General Assembly Comment No. 6: Article 6 (Right to life)
UN Doc HRI/GEN/1/Rev 1 at 6 (1994)

United Nations Convention on the Law of the Sea (adopted 10 December 1982)

Convention on Third Party Liability in the Field of Nuclear Energy (adopted in Paris, 29 July
1960)

Convention on Civil Liability for Nuclear Damage (adopted in Vienna, 21 May 1963)

Declaration of the United Nations Conference on the Human Environment (Stockholm) UN
Doc.A/CONF/48/14/REV.I

Statute of the International Court of Justice, 18 April 1946

Convention Concerning the Protection of the World Cultural and Natural Heritage (Adopted
16 November 1972)

UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought
and/or Desertification Particularly in Africa (UNCCD), Paris, 14 October 1994 (Entry into
force 26th December 1996)

United Nations (UN) Framework Convention on Climate Change, New York, 9 May 1992.

Entry into force 21 March 1994

Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III)

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998)

United Nations Conference on Environment and Development (adopted 3-14 June 1992)
A/CONF. 151/26 Vol.1

The International Law Commission's Articles on State Responsibility. Draft Articles on Responsibility of States for Internationally Wrongful Acts (Part One), November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1. The Commission was established by the United Nations General Assembly in 1948

Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail (signed at Ottawa) 15 April 1935

Statute of the International Court of Justice

SECONDARY SOURCES

Journal Articles

Abel W, 'Global Pollution and Human Rights' (1972) 12 NRJ 195

Abraham S and Abraham CM, 'The Bhopal case and the development of environmental law in India' (1991) ICLQ 334

Aderemi PO, 'Nigerian Courts and the Enforcement of Fundamental Rights' (being a memorial lecture delivered on 12th May, 2010 in honour of Hon Justice Idigbe at University of Benin, Nigeria)

<<http://nigerianlawguru.com/articles/human%20rights%20law/NIGERIAN%20COURTS>

[%20AND%20THE%20ENFORCEMENT%20OF%20FUNDAMENTAL%20RIGHTS.pdf](#)>

accessed 13 July 2015

Akinsola AO, 'civil liability for oil pollution under Nigerian Law' The Nigerian Institute of Advance Legal Studies (Journal of Law and Public Policy) 315 <<http://www.nials-nigeria.org/journals/Ayodele%20Oladiranlawp>> accessed 4 June 2014

Amao OO, 'Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States' (2008) 52 JAL 89

Amechi EP, 'Litigating Right To Healthy Environment In Nigeria: An Examination Of The Impacts Of The Fundamental Rights (Enforcement Procedure) Rules 2009, In Ensuring Access To Justice For Victims Of Environmental Degradation' (2010) 6 Law, Environmental & Development Journal 320.

Amirthalingam K, 'Rylands Lives' (2004) 63 CLJ 274

Anaebio OK and Ekhaton EO, 'Realising substantive rights to healthy environment in Nigeria: a case for constitutionalisation' (2015) 17 ELR 82

Atsegbua L, 'Environmental rights, pipeline vandalism and conflict resolution in Nigeria' (2001) 5 IELTR 89

Avinst A, 'Absolute liability for oil spillage' (1959-1970) 36 Brooklyn Law Review 359

Barham R, 'Environmental: Rylands v Fletcher – foreseeability of harm' (1994) 5 ICCLR C42

Boyle A, 'Human rights and the environment: where next?' (2012) 23 EJIL 613

Boyle A, 'Pulp Mills Case: A Commentary' 2015
<http://www.biicl.org/files/5167_pulp_mills_case.pdf> accessed 20 April 2015

Boyle AE, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17(1) JEL 3

Carstensen PC, 'Explaining Tort Law: The Economic Theory of Landes and Posner' (1987-1988) 86 Michigan Law Review 1161.

Chilenye N, 'Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) 54 JAL 184

Delaume GR, 'Excuse for Non-Performance and Force Majeure in Economic Development Agreements' (1971) 10 Columbia Journal of Transnational Law 242

Ebeku KSA, 'Compensation for damage arising from oil operations: Shell Petroleum Development Company of Nigeria v Ambah revisited' (2002) 7 IELTR 155

Ebbesson J, 'The Aarhus Convention, Access to Justice and Compliance by the UK' (2013) 24 (2/3) ELM 56

Ekhatior EO, 'Improving Access to Environmental Justice under the African Charter on Human and People's Rights: The Roles of NGOs in Nigeria' (2014) 22 AJICL 63

Ekhatior EO, 'Environmental Protection in the Oil and Gas Industry in Nigeria: the Roles of Governmental Agencies' (2013) 5 IELR 196

Ehusani AJ, 'Fundamental Human Right to Healthy Environment (a case for justiciability)' (2011) Human Rights Review- An International Human Rights Journal-An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, and the National Human Rights Commission of Nigeria 2(2) July

Emeseh E, 'Mainstreaming enforcement for the victims of environmental pollution: towards effective allocation of legislative competence under a federal constitution' (2012) 14 ELR 185

English R, 'No fault liability; the Cambridge Water case' (1993) JPEL 409

Etemire U, 'Public Access to Environmental Information: A Comparative Analysis of Nigerian Legislation with International Best Practice' (2014) 3 TEL 149

Fagbohun O, 'Imperatives of Environmental Restoration Due to Oil Pollution in Nigeria' (2007) 18 SLR 347

Fitzmaurice M, 'The European Court of Human Rights, Environmental Damage and the Applicability of Article 8 of the European Convention on Human Rights and Fundamental Freedoms (Case Comments)' (2011) 13 ELR 107

Francioni F, 'International human rights in an environmental horizon' (2010) 21 EJIL 43

Gaines SE, 'International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?' (1989) 30 HILJ 311

Gerhart PM, 'The Death of Strict Liability' (2008) 56 BLR 245

Gill GN, 'Human rights and the environment in India: access through public interest litigation' (2012) ELR 204

Harrison J, 'Reflections on the Role of International Courts and Tribunals in the Settlement of Environmental Disputes and the Development of International Environmental' (2013) 25 JEL 501

Handl G, 'Declarations of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on the Environment and Development, 1992' (2012) 1 <<http://legal.un.org/avl/ha/dunche/dunche.html>> accessed 12 January 2015

Ingelson A and Nwapi C, 'Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis' (2014) 10 (1) Law, Environmental & Development Journal 1

Kalu VE, 'State Monopoly and Indigenous Participation Rights in Resource Development in Nigeria' (2008) 26 JENRL 418

Kalu VE and Stewart NF, 'Nigeria's Niger Delta Crises and Resolution of Oil and Gas Related Disputes: Need for a Paradigm Shift' (2007) 25 JENRL 244

Landes WM and Posner RA, 'The Positive Economic Theory of Tort Law' (1980-1981) 15 Georgia Law Review 851

Lesniewska F, 'Reviews: Human Rights and Environmental Sustainability' (2013) 25 JEL 333

Muriel Marmursztejn, 'Force majeure clauses of an oil company's upstream agreements: a review' (1998) 7 International Business Law Journal 781

Mafessanti M, 'Responsibility for environmental damage under international law: can MNCs bear the burden...and how?' (2009-2010) 17 Buffalo Environmental Law Journal 87

Mbu VI, 'Problems of the Nigerian Legal System in the light of the Analytical Jurisprudence of Norzick and Rawls' (1994) 6 SLJIL 111

McConnell LJ, 'Establishing Liability for Multinational Companies in Parent/Subsidiary Relationships' (2014) 16 ELR 50

McCrudden C, 'Human Rights Histories' (2005) 35 OJLS 179

Murphy J, 'The Merits of Rylands v Fletcher' (2004) 24 OJLS 643

Murdoch J, 'Environmental Protection within Scope of European Convention (Case Comment)' (1997) 59 SPEL 17

Nolan D, 'The distinctiveness of Rylands v Fletcher' (2005) 121 LQR 421

Nannuguhan M, 'The Judicial System of Nigeria' (1987) 7 Army Lawyer 20

Ojukwu-Ogba NE, 'Legal and Regulatory Instruments on Environmental Pollution in Nigeria: much talk, less teeth' (2006) 8/9 IELTR 201

Okechukwu E, 'Impact of Nigerian International Petroleum Contracts on Environmental and Human Rights of Indigenous Communities' (2013) 21 AJICL 345

Okon EE, 'The environmental perspective in the 1999 Nigerian Constitution' (2003) 5 ELR 256

Oosterveen W, 'Some recent developments regarding liability for damage resulting from oil pollution- from the perspective of an EU member State' (2004) 6 ELR 6 223

Oshionebo E, 'Transnational Corporations, civil society organisations and social accountability in Nigeria's oil and gas industry' (2007) AJICL 15(1) 107

Percival RV, 'Liability for environmental harm and emerging global environmental law' (2010) 25 Maryland Journal of International Law 37

Pike R, 'Application of the Rule in Rylands v Fletcher' (2012) Construction Newsletter Nov/Dec 6-7

Reid E, 'Liability for dangerous activities: a comparative analysis' (1999) 48 ICLQ 731

Reid K, 'Strict Liability: Some Principles for Parliament' (2008) 29 SLR 173

Rubin EL, 'Rethinking Human Rights' (2003) 9 International Legal Theory 5

Ruth AB and Chinewubeze C, 'Environmental Right and Human Rights Enforcement in Nigeria: Visiting the Nexus and a Call for Reform' (2011) Human Rights Review- An International Human Rights Journal-An Annual Publication of the Department of Public Law, Ahmadu Bello University, Zaria, and the National Human Rights Commission of Nigeria 2(2) July

Sen B, 'Civil Liability for Injurious Consequences of Potentially Hazardous Activities—the Need for Uniform Law' (1996) Uniform Law Review 1 (3) 453

Shields R, 'Liability without fault, Rylands v Fletcher Revitalised' (1999) 2 Trinity CL Rev 124-142

Simpson B, 'Legal Liability for Bursting Reservoirs: The Historical Context of "Rylands v Fletcher"' (1984) 13 JLS 209

Tineke Lambooy T and Rancourt ME, 'Shell in Nigeria: From Human Rights to Corporate Social Responsibility' (2008) 2 Hum Rights and Int'l Legal Discourse 241

Worika IL, 'Deprivation, Despoilation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta? (2001-2002) 8 (1) JICL 1

Waite A, 'The quest for environmental law equilibrium' (2005) 7 ELR 34

Waite AJ, 'Deconstructing the Rule in Rylands v Fletcher' (2006) 18 JEL 423

Wick L 'Human Rights Violations in Nigeria: Corporate Malpractices And State Acquiescence In The Oil Producing Deltas of Nigeria' (2003-2004) 12 Mich St UJ Intl L 63

William S, 'The Origin of Human Rights' (1939) 24 Marquette Law Review 1

Woodside FC and others 'Why Absolute Liability under Rylands v Fletcher is Absolutely Wrong' (2004) 29 (1) U Dayton L Rev 1

Text Books

Bell S and McGillivray D, *Environmental Law* (7th edn OUP 2008).

Bell Sand others, *Environmental Law* (8th edn OUP 2013)

- Bix B, *Jurisprudence: Theory and Context* (4th edn, Sweet & Maxwell 2006) 67.
- Chatterjee C, *Methods of Research in Law* (2nd edn, Old Barley Press 2000)
- Chatterjee C, *Alternative Dispute Resolution: A Practical Guide* (Routledge 2008)
- Crawford J, *The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries* (3rd edn, Cambridge University Press 2005)
- Curzon LB, *Dictionary of Law* (6th edn, Pearson Education 2002)
- Davis H, *Human Rights Law* (3rd edn OUP 2013)
- Fagbohun O, *The Law of Oil Pollution and Environmental Restoration A Comparative Review* (Odade, Lagos 2010)
- Foster S, *Human Rights and Civil Liberties* (Pearson 2003)
- Frynas JG, *Oil in Nigeria: conflict and litigation between oil companies and village communities* (Lit Verlag 2000)
- Garner BA, *A Dictionary of Modern Legal Usage* (2nd OUP 1995)
- Garner BA (ed), *Black's Law Dictionary* (8th edn, Thomson West 2004)
- Hart HLA, *The Concept of Law* (2nd edn, OUP 1997)
- Harris P, *An Introduction to Law* (6th edn, Butterworths 2002)
- Harris JW, *Legal Philosophies* (OUP 2004)
- Harpwood V, *Modern Tort Law* (17th edn 2009)
- Hoffman D and Rowe J, *Human Rights in the UK, An Introduction to the Human Rights Act 1998* (4th edn, Pearson 2013)
- Jacobs FG and Roberts S, *The Effect of Treaties in Domestic Law: United Kingdom National Committee of Comparative Law volume 7* (Sweet and Maxwell 1987)
- Hughes Dand others, *Environmental Law* (4th edn, Butterworths 2002)
- Hutter BM (ed), *A Reader in Environmental Law* (OUP 1999)

- Martin EA (ed), *Oxford Dictionary of Law* (5th edn, OUP 2003)
- Marks S and Clapham A, *International Human Rights Lexicon* (OUP 2005)
- Morris C and Murphy C, *Getting a PhD in Law* (Hart Publishing 2011)
- Murphy J, *Street on Torts* (12th edn, OUP 2007)
- O'Bryne DJ, *Human Rights: An Introduction* (Pearson 2003)
- Raz J, *The Authority of Law* (Clarendon Press 1979)
- Rogers WVH, *Winfield and Jolowicz on Tort* (18th edn, Thomson Reuters 2010)
- Salter M and Mason J, *Writing law dissertations: an introduction and guide to the conduct of legal research* (7th edn, Pearson Longman 2007)
- Stewart WJ and Burgess R, *Collins Dictionary of Law* (HarperCollins Glasgow 1996)
- Stookes P, *A Practical Approach to Environmental Law* (OUP 2005)
- Turner C, *Tort Law* (2nd edn, Hoder Arnold 2007)
- Turner C and Hodge S, *Unlocking Torts* (2nd edn, Hoder Arnold 2007)
- Twining W, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP Cambridge 2009)
- Uglove S, *Evidence Text & Materials* (Sweet and Maxwell 1997)
- Wacks R, *Philosophy of law: A Very Short Introduction* (2nd edn, OUP 2014)
- Watkins D and Burton M (eds), *Research Methods in Law* (Routledge 2013)
- Weir T, *A CaseBook on Tort* (10th edn, Sweet & Maxwell 2004)
- Woodley M, *Osborn's Concise Law Dictionary* (10th edn, Sweet & Maxwell 2005)
- Wolf S and Stanley N, *Environmental Law* (4th edn, Cavendish 2003)
- Zweigert K and Kötz T, *Introduction to Comparative Law* (3rd edn OUP 1998)

Newspapers

Amzat A, 'Poor media coverage of oil-gas industry' *The Guardian* (Nigeria, 19 March 2015) <<http://guardian.ng/opinion/poor-media-coverage-of-oil-gas-industry/>> accessed 10 August 2015

Asu F, 'Shell declares force majeure on gas supply to NLNG' *Punch News* (Nigeria, 10 August 2016) <<http://punchng.com/shell-declares-force-majeure-gas-supply-nlng/>> accessed 12 June 2016

Bloomberg, 'Exxon declares force majeure as Nigeria's production drops again' *Energy Voice* (14th May 2016) <<https://www.energyvoice.com/oilandgas/africa/109520/109520/>> accessed 12 June 2016

Deutsch A and Sekularac I, 'Nigerian villagers sue Shell in landmark pollution case' (2012) (Reporting for Reuters) <<http://www.reuters.com/article/2012/10/11/us-shell-nigeria-lawsuit-idUSBRE8991SE20121011>> accessed on 5 May 2014

Duffield C, 'Nigeria: World oil pollution capital' *BBC News*, (Niger Delta, 15 June 2010) <<http://www.bbc.co.uk/news/10313107>> accessed 14 June 2014

Reuters, 'Exclusive: Nigeria loses billions in cut price oil deals-report' <<http://www.reuters.com/article/us-nigeria-oil-idUSBRE89N0VV20121024>> (Nigeria 24 October 2012) accessed 27 June 2017

Robertson C and Krauss C, 'BP May Be Fined Up to \$18 Billion For Spill in Gulf' *New York Times* (New York, 4 September 2014) <http://www.nytimes.com/2014/09/05/business/bp-negligent-in-2010-oil-spill-us-judge-rules.html?_r=0> accessed January 2016

Ross W, 'Nigerian oil firms "deflect blame for spills" says Amnesty' *BBC News* (Africa, 7 November 2013) <<http://www.bbc.co.uk/news/world-africa-24839324>> accessed 14 June 2014

The Guardian, 'How to lose \$35bn' (Nigeria 13 November 2012) <<https://www.theguardian.com/world/2012/nov/13/nigeria-oil-corruption-ridabu>> accessed 27 June 2017

Umoru H, 'Nigeria has highest oil spill in the world' *Vanguard News* (Nigeria, 14 November 2012) <<http://www.vanguardngr.com/2012/11/nigeria-has-highest-oil-spill-in-the-world-senate/>> accessed 15 August 2015

Franco V, 'Bayelsa Government decries alarming rate of environmental pollution' *Daily Post* (Nigeria, August 13 2015) <<http://dailypost.ng/2015/08/13/bayelsa-government-decries-alarming-rate-of-environmental-pollution/>> accessed September 2015

Vidal J, 'Niger delta communities to sue shell in London for oil spill compensation' *The guardian* (London, 7 January 2015) <<https://www.theguardian.com/environment/2015/jan/07/niger-delta-communities-to-sue-shell-in-london-for-oil-spill-compensation>> accessed 15 October 2015

John Vidal, 'Shell faces payouts in Nigeria oil spill case', *The guardian* (London, 20 June 2014) <<https://www.theguardian.com/environment/2014/jun/20/shell-faces-payouts-nigerian-oil-spill-case>> accessed August 2014

Vidal J, 'Shell announces £55m payout for Nigeria Oil spills' *The guardian* (London 7 January 2015) <<https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>> accessed 14 August 2015

Ward B and Hicks N, 'What is the "Polluter Pays" Principle?' (Grantham Research Institute at London School of Economics in collaboration with the Guardian) *The Guardian* (London, 2 July 2012) <<https://www.theguardian.com/environment/2012/jul/02/polluter-pays-climate-change>> accessed 14 August 2015.

Walker A, 'The day oil was discovered in Nigeria' *BBC News* (Oloibiri, Nigeria, 17 March 2009) <<http://news.bbc.co.uk/1/hi/world/africa/7840310.stm>> accessed July 2 2014.

Vanguard News, 'UK warns Buhari: Using military confrontation in the Niger Delta could end in disaster' (Nigeria, 16 May 2016) <<http://www.vanguardngr.com/2016/05/uk-warns-buhari-using-military-confrontation-in-niger-delta-could-end-in-disaster/>> accessed 16 May 2016

Vanguard News, 'NNPC and the FoI Act' (Nigeria, 22August 2012) <<http://www.vanguardngr.com/2012/08/nnpc-and-the-foi-act/>> accessed 5 February 2015

Vanguard News, 'Nigerian King takes Shell to court in London' *Vanguard* (Nigeria, 22 November 2016) <<http://www.vanguardngr.com/2016/11/nigerian-king-takes-shell-court-london/>> accessed 23 November 2016

Websites

Environmental Resource Institute, 'A Synopsis of Laws and Regulations on the Environment in Nigeria'. <<http://www.elri-ng.org/newsandrelease2.html>> accessed 14 July 2014

Shell Nigeria, 'Shell in the Community'
<<http://www.shell.com.ng/environment-society/shell-in-the-society/gmou.html>> accessed 5 August 2015

Health and Safety Executive, 'What is a substance hazardous to health?'
<<http://www.hse.gov.uk/coshh/basics/substance.htm>> accessed 22 November 2016

Leigh Day, 'Hearing to determine key legal issues in claim against shell by 15,000 Nigerians' (London, 28 April 2014)<<http://www.leighday.co.uk/News/2014/April-2014/Shell's-first-time-in-UK-Court-over-key-issues-in>> accessed 12 January 2015

Shell Nigeria, 'Environment and Society-How we Respond to Spills'
<<http://www.shell.com.ng/environment-society/environment-tpkg/oil-spills.html>> accessed 5 August 2015

Nigerian National Petroleum Corporation, 'Joint Venture Activities' <<http://nnpcgroup.com/NNPCBusiness/UpstreamVentures/JointVentureActivities.aspx>> accessed 15 June 2014

Nigerian National Petroleum Corporation, 'About NNPC'
<<http://nnpcgroup.com/AboutNNPC/CorporateInfo.aspx>> accessed 4 August 2015.

National Oil Spill Detection and Response Agency <<http://nosdra.org.ng/>> accessed 4 August 2015

Official website of the Niger Delta Development Commission (NDDC)
<<http://www.nddc.gov.ng/about%20us.html>> accessed 5 August 2015

Gas Flaring Lawsuit (re oil companies in Nigeria) <<http://business-humanrights.org/en/gas-flaring-lawsuit-re-oil-companies-in-nigeria>> accessed 28 October 2015

Nigerian Reports

National Environmental Problems, Implementation of Agenda 21: Review of progress made since the United Nations Conference on Environment and Development, 1992. Information provided by the Government of Nigeria to the United Nations Commission on Sustainable

Development (Fifth Session, 7-25 April 1997)

<<http://www.un.org/esa/earthsummit/nigeriac.htm>> accessed 15 August 215

Federal Ministry of Environment, General Report for the 9th National Council on Environment, Themed 'Green Economy-A Panacea for Sustainable Development' 5th – 10th May 2013 (Memo No. 10: FMENV/9TH/NCE/STATE/BAY/EA&R/010) p16

The State of Human Rights in Nigeria, Being a Report on the State of Human Rights in Nigeria, 2008 (Nigerian National Human Rights Commission, Abuja 2008) 199-200

Nigerian Policy Document

The National Policy on Environment, Nigeria 'Guiding Principles' (1999)

<<http://www.environment.gov.ng/index.php/downloads/6-national-policy-on-environment>> accessed 4 August 2015.

UN Documents

United Nations Environment Programme, 'Environmental Assessment of Ogoni Land' (2011) DEP/1337/GE

United Nations Conference on Trade and Development, Liability and Compensation for Ship-Source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers (Studies in Transport Law and Policy No. 1 2012) UNCTAD/DTL/TLB/2011/4

International Law Commission Report on the Work of its Fiftty-fifth Session (5 May to 6 June and 7 July to 8 August 2003) Supplement No. 10 (A/58/10) para 168 p 108 Available at legal.un.org/ilc/reports/2003/2003report.htm accessed 4 January 2015

International Reports

Amnesty International Publications, PETROLEUM, POLLUTION AND POVERTY IN THE NIGER DELTA (2009) 12

Human Rights Watch, Nigeria: No Human Rights Progress in the Niger Delta (December 14 2000) < <https://www.hrw.org/news/2000/12/14/nigeria-no-human-rights-progress-niger-delta>> accessed 5 August 2015

Human Rights Watch, Report 'The Price of Oil: Corporate Responsibility and Human Rights Violations In Nigeria's Oil Producing Communities' (January, 1999) 4

<<http://www.hrw.org/legacy/reports/1999/nigeria/nigeria0199.pdf>> at accessed 5 August 2015

Human Rights Watch, Nigeria: No Democratic Dividend for Oil Delta (October 22, 2002)

<<https://www.hrw.org/news/2002/10/22/nigeria-no-democratic-dividend-oil-delta>> accessed 5 August 2015

Human Rights Watch: Oil Companies Complicit in Nigerian Abuses (February 23, 1999)

<<https://www.hrw.org/news/1999/02/23/oil-companies-complicit-nigerian-abuses>> accessed 5 August 2015

Human Rights Watch, Nigeria: No Democratic Dividend for Oil Delta (October 22, 2002)

<<https://www.hrw.org/news/2002/10/22/nigeria-no-democratic-dividend-oil-delta>> accessed 5 August 2015